

(19,895.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 393.

THE COMMONWEALTH OF KENTUCKY, APPELLANT,

*vs.*

CALEB POWERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.

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1 UNITED STATES OF AMERICA,  
Eastern District of Kentucky. }

At a stated term of the circuit court of the United States, within and for the eastern district of Kentucky, in the sixth judicial circuit of the United States of America, begun and held at the county court house in the city of London, Laurel county, Kentucky, in said district, on the second Monday in May, being also the 8<sup>th</sup> day of that month, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth year.

Court met.

Present: Hon. A. M. J. Cochran, judge.

Among the proceedings had, were the following, to-wit:

THE COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

Be it remembered that heretofore to-wit, on May 8<sup>th</sup> A. D. 1905, at a regular session, first day thereof, of the United States circuit court for the eastern district of Kentucky, sitting at London, the following notice was filed herein, being in words and figures following, to-wit:

2 To Honorable N. B. Hays, attorney general for the State of Kentucky, and Honorable Robert B. Franklin, Commonwealth's attorney for the fourteenth judicial district of the State of Kentucky.

GENTLEMEN: You and each of you are hereby notified that on Monday, May 8<sup>th</sup>, A. D., 1905, in the United States circuit court for the eastern district of Kentucky, at London, Kentucky, within the eastern district of Kentucky; the undersigned, as counsel for and in the name and in behalf of Caleb Powers, will, at motion hour on said day, file in said United States circuit court a duly certified copy or transcript of so much of the record from the Scott circuit court within the State of Kentucky in the case of the Commonwealth of Kentucky against Caleb Powers as by section 641, Revised Statutes of the United States is required to be copied and filed in said United States circuit court on the removal of the said case of the Commonwealth of Kentucky against Caleb Powers from said State court—the said Scott circuit court—to said circuit court of the United States, for trial; or, if the clerk of said Scott circuit court should fail, refuse, or neglect to furnish said Powers or his counsel a duly certified copy or transcript of so much of the record from said State court as is set out above in time for the filing of the same at the time, place, and in the court, above stated, you are notified that in that event



the said counsel for said Powers will, in behalf of said Powers, at the time, place, and in the U. S. circuit court, above stated, docket, and will then and there move said circuit court of the United States to cause, the said case of the Commonwealth of Kentucky against Caleb Powers to be docketed, in said United States circuit court, and will then and there move said United States circuit court to  
 3 take jurisdiction of said case of the Commonwealth of Kentucky against Caleb Powers, and the prosecution pending therein.

FRANK S. BLACK,  
 RICHARD YATES,  
 R. D. HILL,  
 J. C. SIMS,  
 H. C. HOWARD,  
 R. C. KINKEAD,

Att'ys for Powers.

Upon said notice appears the return of the United States marshal, which return was and is in words and figures following, to-wit :—

" Received the within notice at Georgetown, Kentucky, May 5", 1905. Executed the same by delivering a true copy thereof to N. B. Hays, attorney general for the State of Kentucky, at Frankfort, Kentucky, May 5", 1905; further executed same by delivering a true copy thereof to Robert B. Franklin, Commonwealth's attorney for the fourteenth judicial district of the State of Kentucky, at Lexington, Kentucky, May 6", 1905.

Witness my hand this May 6", 1905.

S. G. SHARP,

U. S. Marshal.

By J. I. McDANIEL,

D. U. S. M.

On the same day to-wit :—May 8", 1905, an order was made and entered herein, same being in words and figures following :—

May Term, Monday May 8", A. D., 1905.

Court met :—

Present : Hon. A. M. J. Cochran, judge.

4

COMMONWEALTH OF KENTUCKY, }  
 vs.  
 CALEB POWERS. }

This day came the defendant, Caleb Powers, by counsel and ten dered to the court a duly certified transcript of the record of the Scott circuit court, and moved the court to file the same herein and to have this prosecution docketed in this court, to which motion, the

Commonwealth of Kentucky by counsel objected, and the court being advised, overruled said objection of the Commonwealth and ordered that said transcript be filed and the cause docketed herein, which was done, to which ruling of the court the Commonwealth of Kentucky excepted. Then came the Commonwealth of Kentucky, by counsel and tendered to the court and moved to file the following motion in writing. Now comes the Commonwealth of Kentucky and without waiving its objection to the filing of the purported record herein, and not entering its appearance herein for any other or further purpose than to object to the jurisdiction of this honorable court and for said purpose now asks this honorable court not to take jurisdiction of this cause and to set aside its order permitting the filing of the purported transcript of record herein, and the docketing of said cause and to allow the courts of the Commonwealth to proceed with the trial of said Caleb Powers for the following reasons, viz:—

Because the petitioner has failed to comply with the statutes of the United States, made and provided in that he has failed to procure copies of the process against him by which he is held in custody in the State court, and all pleadings, depositions, testimony and other proceedings in said cause, and has wholly failed to file such

5 copies in this honorable court, and the record or copy thereof now tendered by said petitioner to this court as admitted by him through his attorneys in open court at the time of the offering to file said purported transcript of record, does not contain copies of the process against petitioner and of the pleadings, depositions, testimony and other proceedings in said cause, as required by the provisions of the statutes of the United States in such cases made and provided, and without alleging or avering that the clerk of the Scott circuit court has refused or neglected to furnish to the petitioner such copies; on the contrary, petitioner by his counsel, at the time of offering to file said transcript of record, upon objections by the Commonwealth of Kentucky, through counsel made to this honorable court the following statement:

"Mr. HILL (of counsel for petitioner): May it please the court, in the case of Commonwealth of Kentucky *vs.* Caleb Powers, pending in the Scott circuit court, I desire to file the record from the State court on a petition for removal.

The COURT: A transcript of record.

Mr. KINKEAD (of counsel for the petitioner): A partial transcript.

Mr. HILL: We understand that the clerk has not put everything in the record, although his certificate practically makes a complete transcript.

Mr. HILL: Your honor will notice that the certificate is that the foregoing 141 pages of typewritten matter contain true and exact copies." In fact the record is much larger than this copy, many more things not copied than have been copied. It so happened that the May term of the Scott circuit court convened last Monday,  
6 just a week ago. Counsel for Caleb Powers thought it best to file a motion and a petition for a removal of the cause at

that time. This is the next term of the United States circuit court for the eastern district of Kentucky, and it became and is necessary that we present the record or do the best we can toward furnishing it. Now, we want to suggest to the court and counsel that this transcript does not contain a copy of everything in the case, but we will hereafter, just as soon as we can get it, ask the court to allow us to file a complete transcript."

Petitioner by his counsel having thus admitted that his failure to comply with the statute of the United States in having a complete transcript of the record of the State court was not because of the failure, neglect, or refusal of the clerk of said court to make a complete transcript of the record, but in order that the petitioner might, by filing a partial transcript before this honorable court on this, the first day of its term, thereby interrupt and suspend further proceedings in the State court. This honorable court cannot and should not permit the docketing of this cause for any purpose or for any time.

2. The court is further asked to set aside the order docketing this cause and the filing of the purported transcript of record herein, because by said transcript itself it is made to appear that said petitioner Powers has waived his right to a transfer to this honorable court by assenting to the jurisdiction of that court and having three separate trials therein, with appeals to the court of appeals of Kentucky, in which said court questions now presented to this court for adjudication and revision were adjudicated fully by said court, and by virtue of the provisions of the statutes of the United States

7 authorizing a removal from the State court to this honorable court, petitioner was required to file such application before the trial or final hearing of the cause, and it is now too late.

3. This court should set aside the order docketing this cause and filing the purported transcript herein, because such transcript of record itself discloses the fact that no general question is or can be made therein so as to give this court jurisdiction, and the said transcript of record discloses the fact that the only two questions claimed by the petitioner to be general questions, to-wit, a refusal to recognize the pardon pleaded in said cause, and the failure of the statute of Kentucky to authorize an appeal from the decisions of the circuit judge to the court of appeals of challenges of jurors for cause, have been adjudicated in this cause, both by the circuit court and the court of appeals of Kentucky, and are now *res adjudicata*, and cannot be revived or adjudicated herein by this honorable court.

4. The court is further asked to set aside the order docketing this cause and the filing of the purported transcript because the said transcript discloses the fact that the State court has not passed on the motion to remove and has referred that action until the cause shall be called for trial at the time set, viz July 10<sup>th</sup>, 1905, to which the defendant objected, which objection was overruled and the court thereupon ordered said motion to be filed, which was done, but

overruled the same, to which the Commonwealth of Kentucky excepted.

The defendant Powers by counsel then stated to the court that by reason of the length of the record in this cause in the Scott circuit court it was impossible for the clerk of that court to copy all of said record after the filing of the petition for removal on Wednesday, May 3", 1905, by this day, to-wit—, May 8", 1905, and thereupon the court granted to said Powers until June 8", 1905, in which to complete said transcript of record and file the same herein, to which the Commonwealth of Kentucky excepted. Thereupon the defendant moved the court to direct the clerk of this court to issue a writ of *habeas corpus cum causa* directing the marshal of this court to bring the body of the defendant, Caleb Powers, into the custody of this court, on which motion the court takes time, thereupon the further hearing of this cause was, on motion of the defendant, Caleb Powers, postponed until Thursday, June 8", 1905, at Maysville, Kentucky, to which ruling of the court the Commonwealth of Kentucky excepted.

On the same day, to-wit: May 8", 1905, the motion mentioned in the following order was filed herein, same being in words and figures, following:

United States Circuit Court for the Eastern Kentucky District.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Motion.
vs.	
CALEB POWERS, Defendant.	

Now comes the Commonwealth of Kentucky and without waiving its objection to the filing of the purported record herein, and not entering its appearance herein for any other or further purpose than to object to the jurisdiction of this honorable court, and for said purpose, now asks this honorable court not to take jurisdiction of this cause and to set aside its order permitting the filing of the purported transcript of record herein, and the docketing of said cause and allow the courts of the Commonwealth to proceed with the trial of said Caleb Powers for the following reasons, viz:

Because the petitioner has failed to comply with the statutes of the United States, made and provided in that he has failed to procure copies of the process against him by which he is held in custody in the State court, and all pleadings, depositions, testimony and other proceedings in said cause, and has wholly failed to file such copies in this honorable court and the record or copy thereof now tendered by said petitioner to this court, as admitted by him through his attorneys in open court at the time of the offering to file said purported transcript of record, does not contain copies of the process against petitioner and of the pleadings, depositions, testimony and

other proceedings in said cause, as required by the provisions of the statutes of the United States in such cases made and provided, and without alleging or averring that the clerk of the Scott circuit court has refused or neglected to furnish the petitioner such copies; on the contrary, petitioner by his counsel, at the time of offering to file said transcript of record, upon objections by the Commonwealth of Kentucky, through counsel, made to this honorable court, the following statement:

"Mr. HILL (of counsel for petitioner): May it please the court, in the case of Commonwealth of Kentucky, vs. Caleb Powers, pending in the Scott circuit court, I desire to file the record from the State court on a petition for removal.

The COURT: A transcript of record.

Mr. KINKADE (of counsel for the petitioner): A partial transcript.

Mr. HILL: We understand that the clerk has not put every-  
10 thing in the record, although his certificate practically makes a complete transcript.

Mr. HILL: Your honor will notice that the certificate is "that the foregoing 141 pages of typewritten matter contain true and exact copies." In fact, the record is much larger than this copy, many more things not copied than have been copied. It so happened that the May term of the Scott circuit court convened last Monday, just a week ago. Counsel for Caleb Powers thought it best to file a motion and a petition for a removal of the cause at that time. This is the next term of the United States circuit court for the eastern district of Kentucky, and it became and is necessary that we present the record or do the best we can toward furnishing it. Now, we want to suggest to the court and counsel that this transcript does not contain a copy of everything in that case, but we will hereafter, just as soon as we can get it, ask the court to allow us to file a complete transcript.

Petitioner by his counsel having thus admitted that his failure to comply with the statutes of the United States in having a complete transcript of the record of the State court made was not because of the failure, neglect or refusal of the clerk of said court, to make a complete transcript of the record but in order that the petitioner might by filing a partial transcript before this honorable court on this, the first day of its term, thereby interrupt and suspend further proceedings in the State court. This honorable court cannot and should not permit the docketing of this cause for any purpose or for any time.

2. The court is further asked to set aside the order docket-  
11 ing this cause and the filing of the purported transcript of record herein, because by said transcript itself it is made to appear that said petitioner Powers has waived his right to a transfer to this honorable court by assenting to the jurisdiction of that court and having three separate trials therein, with appeals to the court of appeals of Kentucky in which said court questions now presented

to this court for adjudication and revision were adjudicated fully by said court, and, by virtue of the provisions of the statutes of the United States authorizing a removal from the State courts to this honorable court, petitioner was required to file such application before the trial or final hearing of the cause, and it is now too late.

3. This court should set aside the order docketing this cause and filing the purported transcript herein because such transcript of record itself discloses the fact that no Federal question is or can be made therein so as to give this court jurisdiction, and the said transcript of record discloses the fact that the only two questions claimed by the petitioner to the Federal questions, to-wit, a refusal to recognize the pardon pleaded in said cause, and the failure of the statute of Kentucky to authorize an appeal from the decisions of the circuit judge to the court of appeals of challenges of jurors for cause, have been adjudicated in this cause, both by the circuit court and the court of appeals of Kentucky, and now are *res adjudicata*, and cannot be revived or adjudicated herein by this honorable court.

The court is further asked to set aside, the order docketing this cause and the filing of the purported transcript because the said transcript discloses the fact that the State court has not passed on the motion to remove and has reserved that action until the cause shall be called for trial at the time set, viz, July 10<sup>th</sup>, 1905.

N. B. HAYS,  
Attorney General of Kentucky.

12 STATE OF KENTUCKY, } ss:  
County of Laurel, }

N. B. Hays, attorney general of the Commonwealth of Kentucky, says that in his opinion, the points of law made in this motion are well founded, and this motion is not interposed for delay.

N. B. HAYS.

Subscribed and sworn to before me this 8<sup>th</sup> day of May, 1905.

JOS. C. FINNELL, Clerk.

On a day following to-wit: May 11<sup>th</sup>, 1905, an order was made and entered herein, same being in words and figures following:

May Term, Thursday, May 11<sup>th</sup>, A. D., 1905.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS. }

It is ordered on the court's own motion that so much of the order made herein on a former day of this term as fixes the further hearing of this cause at Maysville, Kentucky, on June 8<sup>th</sup>, 1905, in so



far as it fixes the hearing at Maysville, Kentucky, be and same is hereby set aside.

The transcript referred to in the foregoing order and filed by order of court on May 8<sup>th</sup>, 1905, was and is in words and figures, following, to-wit:

13 Scott Circuit Court, May Term, 1st Day 1st Day of May, 1905.

COMMONWEALTH OF KENTUCKY }  
vs. } Order.  
CALEB POWERS.

It is ordered by the court that the sheriff of Scott county proceed at once to the jail of Jefferson county and bring with him the defendant, Caleb Powers, to Georgetown, Scott county, Ky., and deliver him to the jailor of Scott county, Kentucky, and the jailor of Jefferson county is ordered and directed to deliver said powers to said sheriff.

It is also ordered that the sheriff of Scott county be and is hereby allowed four extra guards to accompany him to the jail of Jefferson county for the purpose of bringing said Powers to Scott county.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By H. J. COFFEE, D. C.

Scott Circuit Court, May Term, 3rd Day of May, 1905.

COMMONWEALTH OF KENTUCKY }  
vs. } Order.  
CALEB POWERS.

This day came defendant in person and by his counsel and upon his motion the mandate of the court of appeals issued April 4th 1905 and heretofore filed in the clerk's office be and the same is now noted of record, and is in words and figures as follows:

14 " THE COMMONWEALTH OF KENTUCKY,  
December 6th, 1905.

The Court of Appeals.

CALEB POWERS, Appellant, }  
vs. }  
COMMONWEALTH, Appellee.

Appeal from a Judgment of the Scott Circuit Court.

The court being sufficiently advised it seems to them the judgment herein is erroneous.



It is therefore considered that said judgment be reversed and cause remanded for further proceedings not inconsistent with the opinion herein, which is ordered to be certified to said court.

A copy.

Attest:

J. MORGAN CHINN, C. C. A.,  
By R. W. KEENAN, D. C.

Issued April 4th 1905.

And upon motion of said counsel and in obedience to said mandate of said court of appeals, the judgment of conviction rendered by this court in this cause at its August special term, 1903, be and the same is now set aside and held for naught and said defendant is now awarded a new trial herein.

Thereupon the attorney for the Commonwealth stated that owing to the great number of witnesses it would be impossible to begin and conclude the trial of this cause within the time fixed by law for the holding of a regular term of this court and therefore necessary that a special term be held, and attorney for the Commonwealth moved the court that a special term of this court be ordered and held 15 for the trial of this cause.

The defendant by counsel thereupon tendered and offered to file a paper writing, which was by said counsel denominated "Defendant's petition for removal of this cause to the United States circuit court" to the filing of which the Commonwealth of Kentucky by her attorney objected.

Thereupon, the court being advised upon the motion of the attorney for the Commonwealth herein above made and entered and being of the opinion that a special term is necessary for the trial of this prosecution it is now, therefore, ordered and directed that a special term of this court be opened, begun and held at the court house in the city of Georgetown, Scott county, Kentucky, for the trial of this cause on Monday, July 10th, 1905, and that said special term shall continue on from and after said 10th day of July, from day to day, Sundays excepted, until said prosecution shall finally be disposed of and the parties to said prosecution and their attorneys will observe this order and govern themselves accordingly. To which motion and the court's ruling thereon the defendant, by counsel objects and excepts.

Thereupon defendant by counsel tendered to the court a paper writing, in words and figures following to-wit:—

"Scott Circuit Court, May Term, 1905.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs.  
CALEB POWERS, Defendant. }

16 The mandate of the court of appeals reversing the judgment entered herein on the — day of August 1903, being filed 2—393

herein and an order being entered setting aside said former judgment of conviction, comes the defendant, Caleb Powers, by counsel, and files herein his verified petition for removal of this prosecution to the United States circuit court for the eastern district of Kentucky for trial at its next term, and the clerk of this court is now ordered to furnish the said defendant copies of all process against him, of indictment, of the pardon, and of all pleadings, depositions and orders entered herein together with a copy of his said petition for removal this day filed and copies of exhibits attached thereto."

And asked that same be filed and entered as an order in this cause, to the filing of which and entering of same as an order herein the Commonwealth by attorney objected, which objection being heard by the court is sustained, the court refused to file said paper writing or to enter same as an order in this cause, and defendant excepts.

This cause is continued until the special term of this court to be held on Monday July 10, 1905 and the defendant is remanded to the custody of the jailor of Scott county.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By H. J. COFFEE, D. C.

The petition for removal to the United States circuit court for the eastern district referred to in the foregoing order and tendered and offered to be filed herein on May 3rd 1905 is as follows:

17 In the Scott Circuit Court of the State of Kentucky, Sitting in Scott County, Kentucky, May Term, 1905.

Petition for Removal to the United States Circuit Court for the Eastern District of Kentucky.

THE COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. }  
CALEB POWERS, Defendant.

Indictment for being Accessory Before the Fact to the Willful Murder of William Geobel.

To the honorable Scott circuit court of the State of Kentucky sitting in Scott county, Kentucky:

First.

The petition of Caleb Powers, the above named defendant, respectfully represents:

I.

That your petitioner is the defendant in the above entitled indictment, which indictment charges your petitioner with having com-

mitted the crime of being accessory before the fact to the willful murder of William Goebel, the exact charge contained in said indictment being as follows:

"The grand jury of the county of Franklin, in the name and by the authority of the Commonwealth of Kentucky, accuse — to the willful murder of William Goebel, committed as follows, viz: The  
18 said Caleb Powers in the said county of Franklin, on the 30th of January, A. D., 1900, and before the finding of this indictment, unlawfully, willfully, feloniously, and of his malice aforethought, and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and others to this grand jury unknown, and did counsel, advise, encourage, aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and other persons to this grand jury unknown, unlawfully, willfully, feloniously, and of their malice aforethought to kill and murder William Goebel, which one of the last five above named persons, or another person, acting with them, but who is to this grand jury unknown, so as aforesaid then and there thereunto by the said Caleb Powers before the fact counseled, advised, encouraged, aided, and procured did, by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel balls and other hard substances, and from which said shooting and wounding the said Goebel died on the third (3rd) day of February, 1900, but which of said last above mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel is to this grand jury unknown; against the peace and dignity of the Commonwealth of Kentucky."

A duly certified copy of said indictment is attached hereto and made a part of this petition marked "A" for identification.

19 That said indictment was found and returned by the grand jury of Franklin county, Kentucky, at, by, and in the Franklin circuit court of said State at the April term thereon on the 17th day of April, 1900.

That your petitioner was arrested under and by virtue of said indictment and is now in the custody of said State thereunder.

## II.

That on the 2nd day of May, 1900, the said indictment was, on the application of your petitioner, duly made and allowed under and in accordance with the laws of Kentucky, by said Franklin circuit court, duly transferred to the Scott circuit court in the county of Scott in said State for trial; was duly filed in said latter named court, and a criminal prosecution against your petitioner, based on said indictment, is now pending and undetermined therein.

## III.

That your petitioner is within the jurisdiction of the United States and of the State of Kentucky and is and all of his life has been a citizen of the United States and of said State; that as such citizen he is entitled to, and entitled to enforce in the judicial tribunals of said State, on the trial and final disposition of said prosecution, all equal civil rights, and to equal protection of the laws, secured to him:

(a.) By that portion of the fourteenth article of amendment to the Constitution of the United States, which provides that, "no  
20 State shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws;"

(b.) By that portion of said amendment wherein it is provided, "nor shall any State deprive any person of life, liberty or property without due process of law;" and

(c.) By that portion of said amendment which provides, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

(d.) By section 1977 of the Revised Statutes of the United States, which provides,

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other;" and

(e.) By the act of Congress of March 1st, 1875, Statutes at Large, vol. 18, page 335, the preamble of which is, "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being  
21 the appropriate object of legislation to enact great fundamental principles into law;"

## IV.

Your petitioner further states that on the 9th day of March, 1900, a warrant was issued for his arrest charging him with being an accessory before the fact to the willful murder of William Goebel as subsequently charged in the indictment hereinbefore set out, a copy of which is hereto attached; and that after the issuing of said warrant, to-wit, on the 10th day of March, A. D., 1900, and subsequent to the date at which William Goebel, named in said indictment was killed, and prior to the finding and reporting of said indictment, his Excellency, William S. Taylor, who was then the duly and legally elected, qualified, actual and acting governor of the State of

Kentucky, and had in his actual possession and under his actual control the office and executive mansion prepared by said State for its governor, and all the books, papers, records, and archives belonging thereto, in due form of law duly and legally granted and delivered to your petitioner, and your petitioner accepted from him a full, complete, absolute and unconditional pardon, release, and acquittance of the identical charge against him in said indictment and the charge now pending in said prosecution against your petitioner in said Scott circuit court and under which your petitioner is now in custody; that said Taylor at the time he granted said pardon had the right and authority, under the constitution and laws of Kentucky, to grant same; that your petitioner accepted  
 22 said pardon, and from the time same was granted he had claimed, and he now claims the full benefit and effect thereof and his liberty thereunder. That on the day said pardon was granted him, it was, by said Taylor as governor aforesaid, duly entered on the executive journal kept in his office and a certificate thereof was duly and in due form of law and as required by law, issued and delivered to him, duly executed by said governor and the secretary of said State, and placed in your petitioner's possession, and same was by your petitioner accepted.

Your petitioner further states that at the time the said pardon was granted to him by his Excellency, the said William S. Taylor and subsequent thereto, the said William S. Taylor was, and prior thereto he had been, recognized, regarded, and treated as the duly elected, actual and acting governor of the State of Kentucky by the executive power and executive departments of the United States Government, including the President, the Attorney General and the Postmaster General, and by the postmaster at Frankfort, Kentucky.

## V.

Your petitioner further charges that for said State to hold him in custody, or to try or to require him to be tried in any one of its courts for the offense alleged against him in and by said indictment, since the granting and acceptance of said pardon and the issuance and acceptance of the certificate thereof, is a denial to him of the equal protection of the laws and the equal civil rights to which he is entitled under and as provided for in and by the portions of said amendment to the Constitution of the United States above copied, and by said section of said Revised Statutes, and by said act of Congress.

23

## VI.

But your petitioner charges that notwithstanding the granting and acceptance of said pardon, the issuance and acceptance of said certificate, the fact that the said William S. Taylor was the governor of Kentucky when said pardon was granted and when said certificate was issued, and was then recognized as such governor by said executive officers of the United States, that he cannot enforce in the

said Scott circuit court in which said prosecution is pending, or in that part of the State in which said Scott county is located, or in any court, judicial tribunal or place of the said State, the equal civil rights and the equal protection of the laws secured to him by each and all of the three portions of said amendment copied above, and by said section of the Revised Statutes of the United States and by said act of Congress for the reasons now set forth :

Your petitioner states that he has been tried by a jury in said Scott circuit court three times under said indictment. At the first of said trials the jury by its verdict returned in court found your petitioner to be guilty as charged in said indictment and fixed your petitioner's punishment at confinement in the Kentucky penitentiary during his life. In pursuance of that verdict a judgment was by said Scott circuit court entered against your petitioner on the — day of August, 1900, adjudging and directing that your petitioner be confined in said penitentiary during his life. To reverse that judgment your petitioner took and prosecuted to a hearing, an appeal to the court of appeals of said State, and said judgment was by said latter court reversed, and in pursuance of that reversal and the

mandate of said court of appeals based on same, your petitioner was by said Scott circuit court granted a new trial.

At the second of said trials the jury by its verdict returned in court found your petitioner to be guilty as charged in said indictment and fixed your petitioner's punishment at confinement in the Kentucky penitentiary during his life. In pursuance of that verdict a judgment was by said Scott circuit court, entered against your petitioner on the — day of October, 1901, adjudging and directing that your petitioner be confined in said penitentiary during his life. To reverse that judgment your petitioner took and prosecuted to a hearing an appeal to the court of appeals of said State, and said judgment was by said latter court reversed, and in pursuance of that reversal and the mandate of said court of appeals based on same, your petitioner was by said Scott circuit court granted a new trial.

At the third and last of said trials the jury by its verdict returned in court found your petitioner to be guilty as charged in said indictment, and fixed your petitioner's punishment at death. In pursuance of that verdict a judgment was by said Scott circuit court, entered against your petitioner on the — day of August, 1903, adjudging and directing that your petitioner be executed. To reverse that judgment your petitioner took and prosecuted to a hearing, an appeal to the court of appeals of said State, and said judgment was by said latter court reversed, and in pursuance to that reversal and the mandate of said court of appeals based on same, your petitioner was by said Scott circuit court granted a new trial.

Since the granting of the new trial the last time, the case has not been retried, but the prosecution under and by virtue of said indictment is still pending and undetermined against your petitioner in said Scott circuit court, and your petitioner



under and by virtue thereof is now confined in the county jail of Scott county of said State, without right of bail.

That at each of said trials your petitioner presented to said Scott circuit court said certificate of pardon, and plead and offered in evidence said pardon and said certificate as a bar and complete defense to said prosecution and the trial and conviction of your petitioner under said indictment, but at each of said trials the said trial court over-ruled said pleas and refused to admit said pardon and certificate as evidence, and held and adjudged that said pardon and certificate were null and void and of no effect whatever, and in each of said trials the said holding of the trial court in reference to said pardon and certificate was duly excepted to and made one of the grounds which was presented and on which a reversal was asked by said court of appeals on the trial of each one of said appeals heretofore mentioned, and on each one of said appeals your petitioner contended that said pardon and certificate entitled him to an acquittal of the charge contained in said indictment but the said court of appeals on the trial and final disposition of each one of said appeals failed and refused to hold that said pardon and certificate authorized your petitioner's acquittance of said charge; instead, that court, as the said trial court had done, held that said pardon and certificate were and are null and void and of no effect whatever. The holding of said court of appeals on the trial of each of said appeals was reduced to writing, and each holding as prepared

and ordered by said court of appeals has been, by the official  
26 reporter of that court, under the court's direction, caused to be printed in, and is now a part of, the official printed reports of said court, and all of said holdings are now in full force and effect as, and they in fact are, the laws of said State in this case, and are binding upon and will have to control this honorable court. That the instances named are the only instances in which said court of appeals or any trial court of said State ever held any pardon and certificate thereof, granted, entered and issued by any governor of Kentucky to be void and of no effect.

That in consequence of the action and holdings of said trial court and said court of appeals above stated, this honorable court cannot, and should this case be retried in this honorable court, could not allow your petitioner to plead or introduce said pardon and certificate as evidence as a defense to the said charges contained in said indictment against him, and could not allow your petitioner his liberty and acquittal under and by virtue of said pardon and certificate, or allow said pardon and certificate to have any effect whatever in your petitioner's behalf, but instead is and will be bound in consequence of said laws to hold said pardon and certificate null and void and of no effect whatever.

Your petitioner files herewith as part hereof a duly certified copy of said pardon marked "B" for identification, and a duly certified copy of the record under the executive journal of the governor of Kentucky, showing that said pardon was so granted and issued as



hereinabove alleged, and marks the same "Exhibit C" for identification. Your petitioner also files herewith and as a part hereof a certified copy of the warrant for his arrest issued March 9th, 27 1900, hereinbefore mentioned, and marks the same "D" for identification.

Your petitioner therefore prays this honorable court that the said indictment and the prosecution pending thereunder in this honorable court against your petitioner be removed into the circuit court of the United States for the eastern district of Kentucky for trial at the next ensuing term of said circuit court, and your petitioner will ever pray.

Second.

The petition of Caleb Powers, the above named defendant, respectfully further represents that he is a citizen of the United States of America and of the State of Kentucky and is and all of his life has been a citizen of said United States and of said State, and is now and has always been within the jurisdiction of the United States and of the State of Kentucky; that as such citizen he is entitled to and entitled to enforce in the judicial tribunal of said State on the trial and final disposition of the indictment hereinafter mentioned, all equal civil rights and the equal protection of the laws secured to him;

(a.) By that portion of the fourteenth article of amendment to the Constitution of the United States which provides that, "No State shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws;"

(b.) By that portion of said amendment wherein it is provided, "Nor shall any State deprive any person of life, liberty or 28 property, without due process of law;" and

(c.) By that portion of said amendment which provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

(d.) By section 1977 of the Revised Statutes of the United States, which provides, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefits of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other;" and

(e.) By the act of Congress of March 1st, 1875, Statutes at Large, vol. 18, page 335, the preamble of which is, "Whereas, it is essential to just government we recognize the equality of all men before the law and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law:"

29 But your petitioner states that he is denied and cannot enforce in the judicial tribunals of this State and in the part of the State where this action is pending, the rights secured to him by said laws and each of said laws, because the said State of Kentucky has enacted a law which has not been repealed nor abrogated, and which is now in full force and effect, to-wit, section 281 of the Criminal Code of Practice of said State which section which reads as follows:

"The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception;" and because of the decisions of the court of appeals of Kentucky, the highest judicial tribunal in this State, rendered in this action to-wit, *Powers v. Commonwealth*, 110 Ky., page 386 &c., *Powers v. Commonwealth*, 114 Ky., 237, and *Powers v. Commonwealth Ky.*, Law Reporter of January 1, 1905, page 1111, and other decisions of said court of appeals of Kentucky upholding the validity of said law notwithstanding its plain contravention of the said provisions of the Constitution of the United States.

Your petitioner states that all of the decisions of the said court of appeals of Kentucky hereinabove referred to, were reduced to writing and each holding as prepared and ordered by said court of appeals has been by the official reporter of that court, under the court's direction, caused to be printed in and is now a part of the official printed reports of said court, and all of said holdings are now in full force and effect as, and they in fact are, the laws of the State of Kentucky in this case, and are binding upon and will have to control this honorable court.

30 Your petitioner respectfully states that he was, on the 17th day of April, 1900, in the Franklin circuit court, indicted by the grand jury of Franklin county, Kentucky, charged with having committed the crime of being accessory before the fact to the willful murder of William Goebel, the exact charge contained in said indictment being as follows:

"The grand jury of the county of Franklin, in the name and by the authority of the Commonwealth of Kentucky accuse Caleb Powers of the crime of being accessory before the fact to the willful murder of William Goebel, committed as follows, viz: The said Caleb Powers in the said county of Franklin on the 30th of January, A. D. 1900 and before the finding of this indictment, unlawfully, willfully, feloniously, and of his malice aforethought, and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and others to this grand jury unknown, and did counsel, advise, encourage aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and other persons to this grand jury unknown, unlawfully, willfully, feloniously and of their malice

aforethought, to kill and murder William Goebel, which one of the last five above named persons, or another person acting with them,  
31 but who is to this grand jury unknown so as aforesaid then and there, thereunto by the said Caleb Powers before the fact counseled, advised, encouraged, aided, and procured, did, by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel ball- and other hard substances, and from which said shooting and wounding the said Goebel died on the third (3rd) day of February, 1900, but which of said last above mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel is to this grand jury unknown; against the peace and dignity of the Commonwealth of Kentucky."

That afterwards, to-wit, on the 3rd day of May, 1900, he was granted by the Franklin circuit court a change of venue from said Franklin circuit court to the Scott circuit court where this action is now pending and undetermined.

Your petitioner states that the death of said Goebel occurred during the existence of intense political excitement following the election of a governor and other State officers in November, 1899; that said Goebel had been the Democratic candidate for the office of governor and was at the time of his death contesting the right of said William S. Taylor to the office of governor, said Taylor who was a Republican candidate for that office, having been actually elected governor and declared elected governor by the duly and legally constituted authorities, and inducted into said office; that this petitioner was at said election the Republican candidate for the office of  
32 secretary of state, and had been actually elected and declared elected to said office, and had been inducted into said office; and there was pending at the time of said Goebel's death a contest for the said office of secretary of state, against this defendant, inaugurated by one C. B. Hill, who had been a Democratic candidate for said office; that the public mind was, by said election and said contest for the office of governor, lieutenant governor, secretary of state, and the other State offices greatly inflamed, and bitter and intense political animosities were excited and fostered by reason thereof, and that such feelings existed at all of the trials of this petitioner hereinafter referred to, and such feelings still exist against him on the part of said adherents of said Goebel throughout the State of Kentucky, and particularly in Scott county.

Your petitioner further states that he was first put on trial under said charge on the 9th day of July, 1900, at a special term of the Scott circuit court begun and holden on said date; that said trial resulted in a verdict of conviction, and he was sentenced to confinement in the State penitentiary during his natural life; that the jury in said trial was selected from a large number of the citizens of said county, and that with three or four exceptions all of the veniremen were purposely summoned because of their known party affiliations which were different from the known party affiliations of your petitioner; that by the laws of Kentucky in such cases made and pro-

vided, the prosecution has the right to five, and the defense to fifteen, peremptory challenges, and that with the exception  
 33 of three or four Republicans and Independent Democrats all of those summoned were known to be partisan Goebel Democrats while your petitioner was and is a Republican and was known to belong to the Republican party; that from the veniremen so summoned, a trial jury was selected that was composed almost, if not entirely of Goebel Democrats, and no Republicans, although there were then residing in said county many hundreds of citizens qualified for jury service who were Republicans and Independent Democrats and not supporters of said Goebel in his candidacy or contest for the office of governor of Kentucky, nor in sympathy with him: but your petitioner avers and charges that all of such citizens, with the exceptions named, were intentionally passed by in summoning said veniremen, in order that your petitioner should not have a fair trial by a jury of his peers impartially selected, but to the end that such jury might be selected to convict him.

Your petitioner further respectfully represents that the sheriff of Scott county to whom is assigned the duty of selecting all jurors whose names are not drawn from the jury wheel is a Goebel Democrat, as are also all the deputy sheriffs of said county.

Your petitioner further states that at said first trial hereinbefore mentioned, the judge of the Scott circuit court, when the original list of names drawn from the jury wheel for jury service had been exhausted, although requested by counsel for this petitioner, and

34 while there remained in said jury wheel about one hundred names, to draw the names remaining in said jury wheel therefrom, refused to do so, but directed the sheriff to summon one hundred men for jury service and explicitly directed him to summon no men for jury service from the city of Georgetown, but to go out into the county for that purpose. Your petitioner states that the said one hundred names that remained at said time in said jury wheel had been placed there by impartial and unbiased jury commissioners prior to the election in November, 1899, and prior to the killing of said Goebel. Your petitioner states that on the morning following the order of the court to the sheriff to summon the one hundred men for jury service from the county and when said one hundred men so summoned had appeared in court, they were seated on one side of the court-room separate and apart from the spectators and other persons; that the judge of said court, without notice to your petitioner or any of his counsel, and without making any request of any of his counsel or of this petitioner to accompany him, left the bench and went to the side of the court room wherein said parties summoned for jury service were assembled, and without swearing said parties, so far as this petitioner saw, heard or has information, as to their excuses for not serving as jurors if any they had, called them up to him one at a time, not in the hearing of this petitioner or his counsel and excused such of them from jury service as he saw fit, without any knowledge on the part of this pe-

tioner or his counsel as to why such parties were thus excused, and  
on the following day the same proceeding was had as to forty  
35 additional men that had been summoned for jury service in  
this case.

Your petitioner further states that an appeal was taken from the judgment of said court to the Kentucky court of appeals, and that at the January term, 1901, of said court, the judgment of the trial court was reversed; that your petitioner was again tried in the Scott circuit court at its October, 1901, term, and a verdict of guilty returned again, fixing the punishment of your petitioner at confinement in the State penitentiary for life; that in summoning the venireman from whom the jury was selected at the second trial the same unjust and unlawful discrimination was practiced, and that of one hundred and twenty-five veniremen summoned in Scott county, all were partisan Goebel Democrats except three, and of one hundred and sixty-eight venireman summoned in the adjoining county of Bourbon all were partisan Goebel Democrats except three, so that of the aggregate of two hundred and ninety summoned, two hundred and eighty-four were Goebel Democrats and six were Republicans, notwithstanding the fact there were many hundreds of citizens in each of said counties qualified for jury service who were Republicans or Independent Democrats, and not Goebel partisans.

Your petitioner states that at said second trial he objected to the formation of a jury from the veniremen summoned as hereinabove stated, and moved to discharge the entire venire on the ground that he could not obtain a fair trial before a jury selected therefrom and filed in support of said objection an affidavit as follows:

36 Scott Circuit Court, October Term, 1901.

“COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. }  
CALEB POWERS, Defendant.

The affiant states that he ought not to be required to go to trial before a jury drawn as a panel for service at the present term of this court or already summoned from the county of Bourbon for the following reasons, namely; that the political canvass in this State in 1899, in which the late William Goebel was candidate for the office of governor, was a heated and angry one, and tended to create great antagonism in the minds of his political adherents against those who opposed; that this canvass was followed by a contest before the State legislature for said office, in which the deepest and fiercest passions were stirred in the minds of his followers in this county, as well as in other counties of the State, including the county of Bourbon; that during that contest the said Goebel was killed, which killing tended still further to deepen and intensify the



political passion of his friends and admirers in this county and in the county of Bourbon and throughout the State, against this affiant, who was a candidate for a State office on the Republican ticket in the said year of 1900. The passions thus created have, since that time been stimulated and fed by the political contests which have since followed, and are still in existence, in this county and Bourbon county. Affiant says that, at a special term of this court in July, 1900, he was put on trial in this county, charged with being an accessory before the fact to the killing of said William Goebel, and was by the jury found guilty. From the judgment of the

37 court at that term, the affiant appealed to the appellate court, the appeal being taken in the early part of September in said year; that at the subsequent October term of said court jury commissioners for this county were selected whose duty it was to select a large number of names and place them in the jury wheel for service during the year 1901.

The three commissioners appointed were John Bradford, Ben Malory and H. H. Haggard, all three of whom were partisan supporters and allies, in the contest referred to of the said William Goebel deceased. The said jury commissioners discharged the work assigned to them by placing in said jury wheel the names of two hundred citizens of Scott county for purposes of said jury service; that at the February term, 1901, of the circuit court of this county and at the May term of the said year, seventy-five or more names were drawn from the jury wheel for said service; that at the present term there were drawn from the said jury wheel for the purpose of securing a jury in this case about one hundred and twenty-five names, that being the entire number of names placed in the wheel. Affiant further states that at the regular State election of 1900 in the county of Scott there were cast for the Democrat-candidate in round numbers 2,500 votes, and for the Republican candidate 2100 votes; that of these 2,100 votes not less than 1300 were white voters of equal character, standing and intelligence with the white voters who cast their votes for the Democratic party at said election.

38 Affiant says that, despite these conditions, which were shown to exist in this county, that of the 200 names placed in the jury wheel by the aforesaid commissioners and drawn out as herein described, only five were sup-orters of the Republican party, and the other 195 being active partisan friends and supporters of the party with which William Goebel was identified as its leader and whose minds and passions had been inflamed against this affiant by continued political agitation.

The affiant further says that of the five Republicans whose names were placed in the jury wheel for jury service by said commissioners, as before stated, one man drawn for service at the February term of this court 1901, and another at the May term; of the remaining three, two of them at the present term disqualified themselves herein by previously formed opinions and the fifth and last after qualification and acceptance on the *voir dire*, was peremptorily challenged by

the Commonwealth. The affiant says that it will be impossible under these circumstances for him to avoid being tried at this term of this court except by a jury composed entirely of his political opponents and exclusively made up of those who were the adherents and admirers of said Goebel, and it will be impossible for him to obtain a fair and impartial trial before any jury so constituted and formed.

The affiant further states that the officers of this county who went to Bourbon county to summon the men for jury service sent directly to the sheriff of Bourbon county, who, together with his deputies, were earnest and ardent adherents, supporters and friends of the said William Goebel and opposed politically to this affiant; that the officers of this county consulted and advised with the said officers of Bourbon county as to the selection of the men summoned and that Wallace Mitchell, deputy sheriff of said county; James Burke, another deputy sheriff of said county; Joseph Williams, a constable of Bourbon county, and James A. Gibson, a guard for county prisoners in Bourbon county, all of whom are the political adherents of said Goebel and politically opposed to this affiant, acted with them in making the selection and summoning said men.

He says that the political complexion of Bourbon is almost equally Democratic and Republican, there being a slight majority in favor of the Democratic party; that of the Republicans, about three-fifths are colored, but there are many conscientious, fairminded and reputable citizens of said Bourbon county, qualified for jury service of the same political faith of this affiant, a great many of whom could have been as readily and conveniently summoned and who would give to both sides herein a fair and impartial trial; but that none of such persons were summoned with the exception of two men, and with these exceptions 91 of the 93 names appearing upon the list furnished this affiant as a correct list of the men summoned from Bourbon county are the names of the supporters and adherents of said Goebel and opposed politically to this affiant, and were summoned for jury service herein by reason of such fact, as this affiant believes.

Affiant further states that said Wallace Mitchell, the deputy sheriff of Bourbon county is now a candidate for sheriff of said county, seeking an election at the hands of the supporters and adherents of said William Goebel, and is their nominee for said office. Said Mitchell, in the fall of 1900, acted in summoning for jury service in this court in the case of Commonwealth vs. Youtsey, indicted for the same offense as this affiant and in making the selection of men to serve as jurors therein made the statement that he would not summon a single Brown Democrat or Republican for such service, and he did not summon any such.

Caleb Powers says the statements in the foregoing affidavit are true, as he believes."

CALEB POWERS.



"Subscribed and sworn to before me this — day of October, 1901.  
J. B. FENNELL,  
Examiner."

But your petitioner states that although the statements in said affidavit were true and known to be true by the court he was forced to submit to trial before a jury composed entirely of Goebel Democrats, your petitioner always having been a Republican in politics as hereinabove stated; and as hereinabove stated your petitioner was at said trial found guilty and sentenced to imprisonment for life by the judgment of said Scott circuit court; that your petitioner took an appeal from the judgment so rendered, which judgment was reversed by the court of appeals of Kentucky at the September, 1902 term; that your petitioner was again and for the third time tried at a special term of the Scott circuit court under the charge hereinabove mentioned, which

41 trial was begun and holden on the third day of August, 1903, and that of the number of one hundred and seventy-six veniremen summoned from Bourbon county from which the jury was selected, three only, or possibly four, were Republicans, and the remaining one hundred and seventy-three (two) were Goebel Democrats and were summoned for that reason, and because they differed politically from your petitioner, whereas there were many hundreds of Republicans and Independent Democrats in said county qualified for jury service, but your petitioner states that they were purposely avoided and passed by in summoning said veniremen, and that said trial jury was not selected impartially as required by law; that in the year 1896 there were over twenty-six hundred votes in said county for William McKinley, Republican candidate for President of the United States, and about twenty-two hundred votes cast for William J. Bryan, his Democratic opponent; that in the year 1899 William S. Taylor, Republican candidate for governor of Kentucky received twenty-seven more votes in said county than were cast for said William Goebel, his Democratic opponent, and that a jury impartially selected could not have been and would not have been, as it was, composed entirely of Goebel Democrats,—on his said third trial one juror, a Goebel supporter, but of doubtful politics, excepted.

Your petitioner further represents that at the third and last trial of this petitioner in said Scott circuit court, the judge thereof entered an order directing the sheriff of said Scott county to  
42 summon two hundred men from Bourbon county for jury service; that this petitioner's attorneys asked the court to admonish the sheriff to summon an equal number of men of each political party; that this request was refused and thereupon counsel for this petitioner asked the court to instruct the sheriff to summon the talesmen as he came to them, regardless of political affiliation. This the court also refused to do.

Your petitioner further states that said trial resulted in a verdict

of guilty affixing the death sentence, and a judgment was thereupon entered, from which judgment an appeal was taken to the court of appeals of Kentucky, and on December 6, 1904, the judgment of conviction was for the third time reversed by said court, and that it is the purpose and intention of the Commonwealth of Kentucky to subject this petitioner to a fourth trial under said charge, within a short time, in said Scott circuit court.

Your petitioner further respectfully states that at each of said three trials the facts in relation to the jurors given or hereinbefore recited were embraced in affidavits filed in support of challenges to the panel and the venire and objections to the formation of the jury from the men summoned as hereinabove mentioned, and were also embraced in the motions and grounds for new trial prepared and filed on behalf of this petitioner at each of said trials, but that they were disregarded by the court and your petitioner's challenge to the panels, to the venire and the motions for new trials in each instance over-  
43 ruled; that by reason of section 281 of the Criminal Code of the State hereinbefore quoted, this petitioner was and is denied the right of any exception on said grounds, and the court of appeals of Kentucky on each of the three appeals hereinbefore set forth have decided that no irregularity in the summoning or impaneling of the jury is a reversible error, and they are powerless to reverse any judgment of said court by reason of such facts and have held said law to be valid and such law is now the law of this case, and said court of appeals of Kentucky are powerless upon any future appeal to reverse any judgment of said court by reason of a repetition of the acts hereinbefore set forth, or for any other irregularity or improper conduct in the formation of the jury, no matter how prejudicial to the substantial rights of your petitioner they may be and must be followed and cannot be disregarded by this honorable court.

Your petitioner therefore prays this honorable court that the said indictment and the prosecution pending thereunder in this honorable court against your petitioner be removed into the circuit court of the United States for the eastern district for trial at the next ensuing term of said circuit court, and your petitioner will ever pray.

RICHARD YATES.  
H. C. HOWARD.

J. C. SIMMS,  
R. D. HILL,  
R. C. KINKEAD,  
FRANK S. BLACK,  
Attorneys for Petitioner.

STATE OF KENTUCKY, }  
County of Jefferson. }

On this 2nd day of May, A. D. 1905, before me, a notary public in and for the county of Jefferson in the State of Kentucky  
44 personally appeared Caleb Powers, who being by me first solemnly sworn according to law, says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

CALEB POWERS.

Sworn to and subscribed before me as witness my hand and seal of office this 3rd day of May, 1905. My commission expires January 30th, 1908.

[SEAL.]

I. G. HAMILTON,  
Notary Public, Scott County, Kentucky.

A copy.

Attest: GEO. S. ROBINSON, C. S. C. C.,  
By H. J. COFFEE, D. C.

45

# EXHIBIT A.

## Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY	{	Indictment for Being Accessory Before the Fact to the Willful Murder of William Goebel.
vs.		
CALEB POWERS.		

The grand jury of the county of Franklin, in the name and by the authority of the Commonwealth of Kentucky, accuse Caleb Powers of the crime of being accessory before the fact to the willful murder of William Goebel, committed as follows, viz:

The said Caleb Powers, in the said county of Franklin, on the 30th day of January, A. D., 1900, and before the finding of this indictment, unlawfully, willfully, feloniously, and of his malice aforethought and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charlis Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and others to this grand jury unknown, and did counsel, advise, encourage, aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and other persons to this grand jury unknown, unlawfully, willfully, feloniously and of their malice aforethought, to kill and murder William Goebel, which one of the last five above named persons or another person acting with them but who is to this grand

jury unknown, so as aforesaid then and there, advised, encouraged, aided and procured, did, by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel ball and other hard substances and from which shooting and wounding the said Goebel died on the 3rd day of February, 1900, but which of said last above mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel is to this grand jury unknown, against the peace and dignity of the Commonwealth of Kentucky.

ROBERT B. FRANKLIN,

Commonwealth's Attorney,  
14th Circuit Court District.

Witnesses: Dr. James R. Ely, D. Meade Woodson, John P. Chinn, Silas Jones, Dr. T. R. Welch. Dr. John South, John E. Miles, Wingate Thompson, B. G. Willis, John Riles, Will Triplett, Dick Tobin, Pat McDonald, E. T. Lillard, Miss Emma Scott, James F. Baily, F. N. Bowman, Miss Sallie Jackson, Newton Frazier, G. Bowman, John M. Riddle, Howell Scott, S. E. Rigg, Dudley Williamson, R. L. Blakeman, Dee Armstrong, George Alexander, Wade H. Watts, F. W. Golden, T. B. Cromwell, Geo. Russell, F. M. Hurst, L. C. Norman, W. S. Parks, J. S. Moore, L. W. Pence, T. N. Lindsey, Geo. W. Scott, W. H. Lancaster, William Watkins, A. J. Packham, J. D. Watson, R. A. Vaughn, W. B. Bridgeford, Courtland Chenault, Henry Ware, E. F. Bak-r, J. F. Noonan, Davis Davis, R. C. King, L. F. Sinclair, G. R. Hemphill, I. N. Green, McKenzie R. Todd, Miss Anna Weist, S. T. Pence, James Egglection Geo. G. Fetter, Charles William Howard, J. F. Haun, W. S. Millender, Wm. Smoot, J. B. Mathewus, James Marrs, William Henry Jones, W. W. Al-coke, W. E. Scott, C. I. Caufield, H. D. Harrod, Howard Johnson, Rev. M. B. Adams, John Brown, Louis D. Smith, Mrs. Albert Kirtley, Mrs. Viola Howell, Geo. Robinson, Geo. Voffee, B. F. Suter, John Suter, J. K. Lewis, J. E. Canfield, J. W. Napier, F. H. Johnson.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

[Endorsed on back of page 46:] Commonwealth of Kentucky, vs. Caleb Powers. Indictment for being accessory before the fact to the wilful murder of William Goebel. A true bill. R. H. Suter, foreman of the grand jury. Presented to the Franklin circuit court by the foreman of the grand jury in the presence of the grand jury and filed in open court this 17th day of April, 1900. Thos. B. Ford, clerk Franklin circuit court. Filed in Scott circuit court May 9, 1900. T. J. Penn, C. S. C. C.

In the name and by the authority of the Commonwealth of Kentucky,  
W. S. Taylor, governor of said Commonwealth, to all to whom  
these presents shall come, Greeting:

Whereas a warrant of arrest has been issued in Franklin county,  
Kentucky, on the — day of March, 1900 against Caleb Powers,  
charging him with the aiding and assisting in the murder of William  
Goebel, as an accomplice in and accessory to said crime, and con-  
spiring to commit same, and knowing that said charge and warrant  
is the result of a political conspiracy to terrorize and oppress for  
political purposes, and also believing implicitly in the innocence of  
said Powers but realizing that as the courts are now organized said  
Powers will be denied a fair trial. Now, know ye, that by virtue of  
the power vested — me by the constitution, I do by these presents  
remit the penalty and pardon the offense as therein alleged and do  
hereby forever acquit, release and discharge said Caleb Powers as  
aforesaid, from the same, enjoining all officers to respect this  
48 pardon, and govern themselves accordingly.

In testimony whereof I have caused these letters to be made  
patent, and the seal of the Commonwealth to be hereunto affixed.  
Done at Frankfort, the 10th day of March in the year of our Lord  
one thousand nine hundred and in the one hundredth and 8 year  
of the Commonwealth.

W. G. TAYLOR,

By THE GOVERNOR.

[SEAL.]

CALEB POWERS, Secretary of State,

By ASSISTANT SECRETARY OF STATE.

(Exhibit B.)

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,

By A. J. COFFEE, D. C.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,

By A. J. COFFEE, D. C.

Commonwealth of Kentucky.

EXECUTIVE DEPARTMENT, FRANKFORT, March 10, 1900.

He pardoned to-day Caleb Powers, John W. Davis, John L. Pow-  
ers, Charles Finley, William H. Culton, charged in a warrant with  
the crime of aiding and assisting in the murder of William Goebel  
in Franklin county, Kentucky, on — day of March, 1900, and as an  
accomplice in and accessory to said crime and conspiring to commit  
same, and says knowing that said charge and warrant is the  
49 result of political conspiracy and to terrorize and oppress for  
political purposes, and also believing implicitly in the abso-  
lute innocence of said Caleb Powers, John L. Powers, Charles Finley  
and William H. Culton, but realizing that as the courts are now

organized said Caleb Powers, John L. Powers, Charles Finley and William H. Culton will be denied a fair trial, pardon is granted.

W. S. TAYLOR,  
Gov. of Ky.

EXHIBIT C.

Commonwealth of Kentucky.

Office of Secretary of State.

I, H. V. McChesney, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof, I hereunto sign my name, and have caused my official seal to be affixed.

Done at Frankfort, this 27th day of April, 1905.

H. V. McCHESNEY,  
Secretary of State,

By W. H. GRAYOT,  
Ass't Secretary of State.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

The foregoing petition for removal to the circuit court of the United States for the eastern district of Kentucky was on said May 3rd 1905, endorsed as follows:—"Tendered and offered to be filed May 3rd 1905.

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

50

Scott Circuit Court, May Term 1905.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
v. }  
CALEB POWERS, Defendant.

The mandate of the court of appeals reversing the judgment entered herein on the — day of August 1903, being filed herein and an order being entered setting aside the former judgment of conviction, comes the defendant, Caleb Powers, by counsel and files herein his verified petition for removal of this prosecution to the United States circuit court for the eastern district of Kentucky for trial at its next term and the clerk of this court is now ordered to furnish

the said defendant copies of all process against him, of the indictment, of the pardon and of all pleadings, depositions and orders entered herein, together with a copy of his said petition for removal this day filed and copies of exhibits attached thereto.

(On the back of the foregoing is the following endorsement):

"Tendered and asked to be filed and entered as an order.

May 3, 1905.

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C."

A copy.

Attest :

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

51

Scott Circuit Court.

May Term, 3rd Day, 9th Day of May, 1900.

COMMONWEALTH OF KENTUCKY,	}	Indictment for Being Accessory Before the Fact to the Willful Murder of William Goebel.
Plaintiff,		
— CALEB POWERS.		

Came Thomas B. Ford, clerk of the Franklin circuit court and filed in this court the original indictment and papers belonging thereto in each of the above cases also a copy of the orders of said Franklin circuit court, which are now filed.

A copy.

Attest :

GEO. S. ROBINSON, C. S. S. C.,  
By A. J. COFFEE, D. C.

The indictment referred to in the above order is as follows:

52

Franklin Circuit Court.

THE COMMONWEALTH OF KEN-	}	Indictment for Being Accessory Before the Fact to the Willful Murder of William Goebel.
tucky		
vs. CALEB POWERS.		

The grand jury of the county of Franklin, in the name and by the authority of the Commonwealth of Kentucky accuse Caleb Powers of the crime of being accessory before the fact of William Goebel, committed as follows, viz :

The said Caleb Powers, in the said county of Franklin on the 30th day of January, A. D. 1900, and before the finding of this indictment, unlawfully, willfully, feloniously, and of his malice afore-



thought and with intent to bring about the death and procure the death of William Goebel did conspire with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and others to this grand jury unknown, and did counsel, advise, encourage, aid and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs and other persons to this grand jury unknown, unlawfully, willfully, feloniously, and of their malice aforethought, to kill and murder William Goebel, which one of the last five above named persons or another person acting with them but who is to this grand jury unknown so as afore- then and there, advised, encouraged, aided and procured, did, by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel ball and other hard substances and from which shooting and wounding the said Goebel died on the 3rd day of February 1900, but  
 53 which of said last above mentioned persons so as aforesaid actually fired the shot that killed the said Goebel is to this grand jury unknown against the peace and dignity of the Commonwealth of Kentucky.

ROBERT B. FRANKLIN,  
 Commonwealth's Attorney, 14th Circuit Court Dist.

Witnesses :

Dr. James R. Ely, D. Meade Woodson, John P. Chinn, Silas Jones, Dr. T. R. Welsh, Dr. John South, John E. Miles, Wingate Thompson, B. G. Williams, John Pies, Will Triflett, Dick Toben, Pat McDonald E. T. Lillard, Miss Emma Scott, James F. Bailey, F. M. Bowman, Miss Sallie Jackson, Newton Frazier, G. Bowman, John M. Riddle, Howell Scott, S. E. Pigg, Dudley Williamson, R. L. Blake-man, Dee Armstrong, Geo. Alexander, Wade H. Watts, F. W. Golden, T. R. Cromwell, Geo. Russell, F. M. Hurst, L. C. Norman, W. S. Parks, J. S. Moore, W. L. Pence, T. N. Lindsey, Geo. W. Scott, W. H. Lancaster, William Watkins, A. H. Packham, J. D. Watson, R. A. Vaughn, W. B. Bridgeford, Courtland Chenault, Henry Ware, E. F. Baker, J. F. Newman, David Davis, P. C. King, L. F. Sinclair, G. P. Hemphill, I. N. Green, McKensie R. Todd, Miss Anna Weist, S. T. Pence, James Egglection, Geo. G. Fetter, Charles William Howard, J. F. Haun, W. S. Millinder, W. M. Scott, J. B. Matthews, James Morris, William Henry Jones, W. W. Alcock, W. E. Scott, C. I. Caulfield, H. D. Howard, Howard Johnson. Rev. M. B. Adams, John Brown, Louis D. Smith, Mrs. Albert Kirtley, Mrs. Viola Howell, Geo. Robinson, Geo. Coffee, B. F. Suter, John Suter, J. K. Lewis, J. E. Canfield, J. W. Napier, F. H. Johnson.

A copy.  
 Attest :

GEO. S. ROBINSON, C. S. C. C.,  
 By A. J. COFFEE, D. C.

- 54 Other papers referred to in said order of May, 9th, 1900 are as follows:

COMMONWEALTH OF KENTUCKY, }  
County of Franklin.

## Affidavit.

Thomas B. Cromwell, being first duly sworn, says that he has information and verily believes that Caleb Powers is guilty of the crime of being accessory before the fact to the wilful murder of William Goebel, in that said Caleb Powers did in the county of Franklin and in other counties of said Commonwealth, unlawfully, willfully, wickedly and of his malice aforethought, with intent to bring about the death and to murder William Goebel, conspire with others to that end, and in consummation of such conspiracy with a gun loaded with powder and leaden ball and other hard substances did as aforesaid in the county of Franklin on the 30th day of January, 1900, procure to be shot and wounded, killed and murdered the said William Goebel.

THOMAS B. CROMWELL.

Subscribed and sworn to before me by Thomas B. Cromwell this the 9th day of March 1900.

T. D. MOORE, P. J. F. C.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE.

- 55 The Commonwealth of Kentucky to any sheriff, constable, coroner, jailor, marshal or policeman of the State of Kentucky:

It appearing from information given under oath by Thomas B. Cromwell, that there are reasonable grounds for believing that Caleb Powers has committed the crime of being accessory before the fact to the wilful murder of William Goebel, you are therefore commanded forthwith to arrest Caleb Powers and bring him before the undersigned to be dealt with according to law.

Witness my hand this 9th day of March, 1900.

T. D. MOORE,  
County Judge, Franklin County.

(On the back of the foregoing warrants are the following endorsement:-

"Executed March 11th 1900 by arresting the within named Caleb Powers and leaving him in the custody of the jailor of Fayette county.

H. M. BOSWORTH, S. F. C.,  
By BEN TREEKMAN, D. S.

COMMONWEALTH OF KENTUCKY }  
 vs. } Warrant of Arrest.  
 CALEB POWERS.

March 27, 1900.—This cause being submitted to the court after hearing the oral proof and facts, it is adjudged by the court that the defendant be held over to April term of the Franklin grand jury and circuit court without bail.

T. B. MOORE.

Filed M'ch 27, 1900.

T. B. FORD, Cl'k."

56 A copy.  
 Attest:

GEO. S. ROBINSON, C. S. C. C.,  
 By A. J. COFFEE, D. C.

Scott Circuit Court, Special July Term, July 11th, 1900.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

The court having considered the motion for continuance made by defendant herein it is ordered that said motion be overruled to which ruling of the court the defendant objects and excepts.

Thereupon the defendant filed a general and special demurrer to the indictment which being heard by the court are over-ruled, to which ruling the defendant excepts.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
 By A. J. COFFEE.

The defendant then produced the pardon which was filed and is as follows:

57 In the name and by the authority of the Commonwealth of Kentucky, W. S. Taylor, governor of said Commonwealth, to all to whom these presents shall come, Greeting:

Whereas, a warrant of arrest has been issued in Franklin county, Ky., on the — day of March, 1900, against Caleb Powers, charging him with aiding and assisting in the murder of William Goebel, as an accomplice in and accessory to said crime, and conspiring to commit same, and knowing that said charge and warrant is the result of political conspiracy to terrorize and oppress for political purposes, and also believing implicitly in the innocence of said Powers but realizing that as the courts are now organized said Powers will be denied a fair trial, now know ye, that by virtue of the power vested in me by the constitution, I do by these presents remit the penalty

and pardon the offense as therein alleged and do hereby forever acquit, release and discharge said Caleb Powers as aforesaid, from the same, enjoining all officers to respect this pardon and govern themselves accordingly.

In testimony whereof I have caused these letters to be made patent and the seal of the Commonwealth hereunto affixed.

Done at Frankfort the 10th day of March, in the year of our Lord one thousand nine hundred and in the one hundred and 8 year of the Commonwealth.

[SEAL.]

W. S. TAYLOR.

By the governor :

CALEB POWERS,  
Secretary of State,

By ————,  
Assistant Secretary of State.

58 A copy.

Attest :

GEO. S. ROBINSON, C. S. C. C.,  
By A. H. COFFEE, D. C.

59 STATE OF KENTUCKY, }  
County of Scott. }

In the Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. }  
CALEB POWERS, Defendant. }

The deposition of W. S. Taylor, taken upon interrogatories and cross-interrogatories on the 31st day of July, 1903, at Indianapolis, county of Marion, State of Indiana, to be read as evidence in an action between Commonwealth of Kentucky, plaintiff, and Caleb Powers, defendant, pending in the Scott circuit court.

Deponent being of lawful age and first duly sworn deposes and says:

1. State your name, age, residence and occupation ?

A. My name is William S. Taylor ; age fifty years next October ; reside in Indianapolis and am a lawyer.

2. Were you ever a resident of the State of Kentucky, if so, state when and where you resided in said State ?

A. I was a resident there until in May, 1900. My residence was in Butler county, Ky. I however, resided in Frankfort from December 1895 until 1900.

3. While a resident of the State of Kentucky, did you ever hold any official position, if so, state the same ?

A. I was elected county clerk of Butler county in 1882, served four years, elected county judge in 1886, reelected in 1890, serving eight years; elected attorney general of Kentucky in 1895, served four years, elected governor in 1899, served until ousted by contest proceedings.

60 4. While a resident of Kentucky, to what political party did you belong?

A. I first affiliated with the Greenback party voting for Peter Cooper, in 1876; I afterwards joined the Republican party and have ever since been a Republican.

5. Were you the nominee of the Republican party for any official position to be voted for by the people at the November election, 1899, if so, what office?

A. I was the nominee of the Republican party for governor in 1899.

6. Who were your opponents on the Democratic ticket at said election?

A. Senator William Goebel and ex-Governor John Young Brown.

7. What was the character of the campaign preceding the election in respect to party feeling and the public interest therein?

A. Intense interest was manifested in the campaign; excitement ran high. The feeling between the Democratic factions was very bitter.

8. What was the popular vote received by you at said election?

A. According to the certified returns Senator Goebel received 191,331 votes; I received 193,714 votes; my majority was 2,383. I have forgotten the number of votes received by Governor Brown.

9. What was the popular vote received by your opponents at said election?

A. According to the certified returns Senator Goebel received 191,331. I have forgotten the number of votes received by Governor Brown.

61 10. Were you in Frankfort at the time of the canvass of the election returns in the fall of 1899, if so, state who conducted and made the canvass of the returns?

A. I was. Judge Pryor, Judge Ellis and Mr. Poyntz conducted the canvass.

11. State whether or not there was any excitement around at Frankfort or prevailing throughout the State at the time of the canvass of said returns, if so, describe the character thereof, so far as you may know or have observed the same?

A. There was great excitement at Frankfort and throughout the State during the canvass of the returns.

12. State the question before the board of election commissioners involved in the canvass of said returns which aroused public discussion and excitement; and also state how that question was decided by the board; and also state whether the decision of said question was for any time supposed to be in doubt?

A. I was not personally before the board but understood that the

opposition sought to have the board refuse to count the votes as returned from Jefferson, Magoffin, Johnson and perhaps some other counties. A majority of the board declined to interfere with the returns. The decision was for some time in doubt.

13. State whether or not during the canvass of the returns many non residents of Frankfort came to Frankfort, if so, give an estimate of persons who attended the canvass of the returns, to what political party they belonged and for what purpose they came, so far as you know; also state whether either party to the contest before

62 the canvassing board secured the presence of witnesses in Frankfort with a view of testifying if it became necessary; state all you know in respect thereto.

A. They did. The friends of both parties came; there were several hundred people in the capitol during that time. The Republicans had a number of people there with a view of using them as witnesses in the event if it became necessary.

14. Who received from the board of election commissioners the certificate of election issued by the board and if you have the certificate, please file the same or a copy thereof?

A. The Republican candidates finally received the certificates of election. I received mine and have it now but could not find it among my papers to-day. If I do find it before this deposition is closed I will allow the notary to incorporate a copy of it as a part of my deposition.

15. Were you inaugurated as governor of the Commonwealth of Kentucky, if so, state the date of your inauguration?

A. I was on the 12th of December, 1899.

16. Were you served with notice of contest of your election if so, when and by whom?

A. I was served with notice of contest just before or at the time the legislature convened.

17. When did the General Assembly, elected in November 1899, meet at Frankfort?

A. Tuesday after the first Monday in January, 1900.

18. State who were the attorneys representing you in your contest for governor before the legislature?

A. W. C. P. Breckinridge, W. O. Bradley, Helm Bruce, T. L. Edellen, Mr. William Sweeney and possibly some others.

19. Did the parties to the contest introduce proof before the

63 contest committee of the General Assembly?

A. They did.

20. Which party introduced that proof first?

A. The contestants.

21. Do you know what arrangements were made and with whom made to secure the presence of witnesses before the contest committee for yourself; if so, state in full all you know in respect thereto?

A. I was not familiar with the details of the arrangements. Our



lawyers had control of that matter. I think subpoenas were issued and placed in the hands of different parties to serve.

22. Were you present at any meeting when arrangements were made to procure the presence of witnesses in your contest, if so, state who were present and state in full what arrangements were entered into?

A. I do not recall attending a meeting for that purpose. I think I did talk with two or three parties concerning the best method of securing the witnesses. I think I spoke to Walter Day, Caleb Powers and perhaps others. I remember that W. H. Culton came to me and stated that he had been selected to go to Jackson county to serve subpoenas and asked me for some money to pay expenses and I furnished him \$125. I think this is about my connection with it so far as I can remember.

23. Did the contest before the legislature arouse any excitement at Frankfort or in the State, and was there any public manifestations of such interest at Frankfort and in the State, and if so, state in full all you know in respect thereto?

64 A. It did throughout the State. The keenest interest was manifested everywhere; excitement became intense; large numbers of people came to Frankfort, partisans of both sides came.

24. What part, if any, did you take in securing the presence of the mountain men at Frankfort on the morning of January 25th 1900; state in full your connection with said movement and state in full its purposes and aims?

A. I advised with Mr. Powers concerning the bringing of the people to Frankfort on January 25th, 1900. It came about in this way. From the time the contest begun I had insisted that my political friends throughout the State, as many as possibly could do so, should come to Frankfort and render whatever aid they could in behalf of the Republican contestees. I had urged that the people come from every county and remain as long as possible. Considerable numbers of our friends did come from different sections of the State; some remained over several days. For several days prior to the 20th of January, 1900, a number of the leading Republicans had been discussing the propriety of holding a large mass meeting to be made up of citizens from all parts of the State for the purpose of passing resolutions and petitioning the legislature in behalf of the Republican State officers. This meeting, as I understood it, had about been agreed upon, but not definitely determined, and I think it was on the 19th of January, perhaps the 20th, that Mr. Powers and myself were discussing this contemplated mass meeting, when he remarked to me that he would like to have the matter definitely

settled in time for him to get a large crowd from his section  
65 of the State, saying that the inaccessibility of his people to railroads made it important that he should have more time than was necessary in other sections of the State. I appreciated the correctness of his position and on the 20th, I think it was, I suggested to him that I had no doubt but that the meeting would



be held and that he start at once and make up his crowd. We discussed the question of transportation. I said to him that I would use my influence as far as I could in securing same. I did discuss the matter of transportation I think with Mr. Paynter, who, I understood, was connected with the railroad and possibly spoke concerning the matter to General Duke, but of this, I will not be positive. At any rate I became satisfied that the necessary cars would be furnished. It was agreed at the time that the people were to be brought only for the purpose of peaceably petitioning the legislature; no force or violence was spoken of or contemplated. On Monday or Tuesday after Mr. Powers had gone it was agreed that it would be best not to hold a mass meeting at all and on Tuesday, I think at my instance, a telegram was sent to Mr. Powers notifying him that the meeting had been called off and not to bring his delegation, but that telegram, I afterwards understood, reached him too late.

25. Were you in Frankfort on the morning of January 25th, 1900 when the men from Bell and other counties of eastern Kentucky arrived?

A. I was.

26. Did you observe their demeanor and how the men conducted themselves during the day, if so, state fully your knowledge upon this subject?

66 A. As far as I saw they were well behaved men.

27. Do you know why the men returned to their homes on the evening of the day of their arrival, if so, state fully all you know in respect thereto?

A. I do not know further than this: Having accomplished what they came for, they had nothing further to do, hence returned.

28. Were any men that came down on the morning of the 25th of January held over and remained in Frankfort thereafter, if so, please state what part you took, if any, in having such men remain over, and the purpose of having such men remain in Frankfort?

A. I had nothing to do with the retention of any of the men who came on the 25th. I think, however, that several did remain.

29. State as far as you know, the character of the men that remained over, their number, where they stayed and how were employed and how cared for?

A. I know nothing of the character or number of men who stayed or where they stayed or how they were employed and cared for. I saw a number of people about the State house, on the public square and on the streets of Frankfort.

30. Were you in Frankfort, and if so, where were you, at the time you first learned that Senator Goebel was shot, and state who were present with you at the time?

31. State in full as far as you can, who first apprised you of the assassination of Senator Goebel, and state in full all that you did and all that occurred so far as you remember within your observation during that day?

67 A. I will answer the 30th and 31st questions together. I was in my office talking to Senator Alexander of Louisville when the shot was fired, he sitting on one side of the desk and I on the other. After hearing the shot, I got up and walked to the door opening into the reception room and made some inquiry about what had happened and at first got no satisfaction. No one seemed to know. I think I then stepped back to my window and looked out and could barely see the prostrate form of someone whom I did not recognize at the time, on the pavement near or just above the fountain. I then stepped back to the door when someone I do not remember who, I rather think it was Leander Guffy came in and reported that Senator Goebel was shot. Just what became of Senator Alexander I do not know. I think, however, that he went out of the back door. I cannot recollect definitely just in what order the different things did occur or just what was said. I know that Senator Alexander and I were talking at the time of the shot, about a Mr. Summers, for whom Senator Alexander was seeking a pardon. In a few minutes after I ascertained that Senator Goebel was shot, there was great excitement everywhere. I remember that some one called the attention of those in the room to the fact that a large crowd was gathering near the gate of the public square. I then thought about calling out the militia at Frankfort and I think I told Captain Davis to go and tell General Collier to call it out at once. He left the office and soon returned and reported that General Collier had done so. I think during this time that different parties were sending out telegrams, just who sent them I do not now remember. I recall that Judge Denny, Senator Burnam and Stephen Sharp were in and about my office.

68 The excitement grew more and more intense and sometime during the day I issued an order for the calling out of the entire State militia. Just what hour this occurred, I do not now recall. I remember that Colonel W. C. P. Breckinridge and Governor W. O. Bradley, and perhaps others, aided me in preparing this call. I stayed in my office the entire day. I recall that I requested Mr. Stephen Sharpe to take charge of and control the crowd about the office. This he did. Many things occurred in quick succession and I cannot possibly recount all that did occur during that day.

32. Do you know where Caleb Powers was on the 30th of January, the day of the assassination of Senator Goebel?

A. I know Mr. Powers had, with others, left for Louisville that morning.

33. Had you any connection with or did you take any part in any proposed movement to secure persons from western Kentucky or other portions of the State, to appear before the legislature or come to Frankfort, if so, state in full all you did in respect to such movement, and the purpose and aim of securing the presence of such persons in Frankfort and what persons assisted or were to assist in getting up the movement?

A. I did. I had tried from the time the contest commenced to

get as many of my friends as possible to come from all parts of the State and to remain in Frankfort as long as they could. I had written letters to my friends urging them to come with a view of  
 69 having their presence and their interest exercise a moral influence on the contest then going on. I felt that it was their privilege, as well as their duty, to do so. After the return of the delegation of the 25th I concluded that it would be a good plan to have a delegation of people from other parts to come to Frankfort, pass resolutions and petition the legislature. I believed such a course would have a good effect if not upon the General Assembly, at least it would upon the general public, and thus ultimately overthrow the party which was usurping the office. Sometime between the 25th and 29th I suggested this course to Mr. Powers and probably Walter Day and others. At first Mr. Powers hesitated but finally give his assent. I am certain I talked to Mr. Powers about this enterprise on the 29th. I think I talked to G. W. Long, also. At any rate it was determined that Long, Day and Powers should go to Louisville and see if the necessary arrangements could be made and he left on the morning of the 30th of January.

34. Do you know whether Caleb Powers had any part in any such movement, if so, state in full all you know in connection therewith?

A. He did as I have before stated.

35. Do you know when Caleb Powers returned to Frankfort after the assassination of Senator Goebel?

A. Sometime in the afternoon of the 30th.

36. Were the militia, after the assassination of Senator Goebel called out, if so, how long after the assassination was it that the militia were called out; state how the call for the militia was made.

70 State whether they were called out under any arrangement made between you as governor of the State and the officers in control and command of the militia. State in full all you did and all you know in connection with the calling out of the militia, the movements of the militia, the purpose for which they were called out and the arrangements then made or previously made, if any, under which they were called out?

A. Some twenty or thirty minutes after Senator Goebel was shot I directed Captain Davies to notify General Collier to order out the Frankfort company. This I think was done verbally. Sometime after that I ordered out the entire State militia as before stated. There had been no specific arrangements made between myself or the officers in control of the militia as to their calling out. I had directed General Collier in a general way to keep the militia in readiness so that in the event a riot or outbreak should occur their services would be available. They were called out by me for the sole purpose of preserving and protecting life and property.

37. Previous to the assassination of Senator Goebel had you ever been informed and if so by whom, whether or not the Democratic leaders or the Democrats or those interested in the contest in behalf of the Democratic candidates, contemplated the use of any force for

the purpose of forcibly driving and expelling the Republican officials from office, if so, state all you know in respect thereto, state from whom you received such information, if you received any, and state if you are advised how the purpose of ousting the Republicans  
71 from their offices was to be executed? Please state fully in respect to the matters herein referred to?

A. Yes, I had at various times heard such rumors. It was also the general rumor that the Democrats had shipped to Frankfort large quantities of arms. I think it was published in some of the papers of the State. I heard at different times that immediately upon the decision of the contest board and of the legislature that the Democrats would forcibly eject from the offices the Republicans without waiting for a decision in the courts as to the validity of their proceedings.

38. Did you take any part in or have any connection with the assassination of William Goebel?

A. I did not, directly or indirectly, or in any other way have any part in, any connection with or any knowledge of the assassination of William Goebel.

39. Do you know W. H. Culton, F. W. Golden, Green Golden, John L. Powers, Caleb Powers, John Davis, Charles Finley, Henry Youtsey, James Howard, Berry Howard, Harland Whittaker, Richard Combes, Frank Cecil and Frank Steele or any of them? And if you are acquainted with either of the persons named, state how long you have known such person or persons, the extent of your association with such person or persons, and state fully your relations to such person or persons during the month of January, 1900 and prior to the assassination of Senator Goebel?

A. I know W. H. Culton. Met him first in the winter of 1896. Met him occasionally while he was clerk in the auditor's office; saw him about the State house several different times during the month of January. First knew F. W. Golden about the time he was appointed guard at the penitentiary; saw him about the  
72 state house occasionally during the month of January; was not on intimate terms with either Culton or Golden. I do not know Green Golden. I saw John L. Powers occasionally about his brother's office. Spoke to him but seldom. I became intimately acquainted with Caleb Powers after he became a candidate for secretary of state and conferred with him frequently during the month of January, 1900. I knew John Davis from the time he came to Frankfort under Governor Bradley's administration and met him every day during the month of January, 1900. I became acquainted with Charles Finley in 1895. We were together many times during the four years we were in Frankfort. We were personal as well as political friends. I met him several times during the month of January, 1900. I became acquainted with Henry Youtsey some time after he came to the auditor's office under Captain Stone. I saw him a few times during the month of January, 1900, but was not on intimate terms with him. I never saw or knew James

Howard and never heard of him until he was introduced to me by Senator Parker in February, 1900. I think I saw Berry Howard a few times about the state house in January, 1900. My acquaintance with him was very slight. I have known Harlan Whittaker from my early boyhood, we were always friends yet not on intimate terms. I never saw Richard Combes and never heard of him until after the assassination and have no recollection of ever seeing Frank Cecil or Frank Steele. I might have met during the canvass these parties just as a candidate would meet hundreds of people without ever being able to ever recognize them again. I have no recollection of ever speaking to either of them.

73 40. Were you ever in any meeting with the persons named in the foregoing question or any of them prior to the assassination of Senator Goebel when the assassination of Senator Goebel was suggested or proposed, if so, state when, where and who were present?

A. I never was.

41. Were you ever in any meeting with said persons named or any of them or other person or persons before the assassination of Senator Goebel when the assassination of William Goebel was suggested or considered by you or any other person?

A. No, sir; never.

42. Were you ever in any meeting with the persons aforesaid or any of them or other person or persons before the assassination of William Goebel when there was suggested or proposed the assassination or the killing of any member of the General Assembly of Kentucky, if so, state when and where and who were present?

A. No, I never was.

43. Were you ever in any meeting with the persons aforesaid or other person or persons before the assassination of William Goebel, when the use of violence or physical force against the General Assembly of Kentucky or any member thereof was suggested or proposed, if so, state fully all you know in respect thereto?

A. No, I never was and never knew of such a meeting.

44. Or were you ever in any such meeting when the use of physical force or the resort to personal violence was suggested or proposed, if so, state fully in respect thereto?

A. No.

45. Did you ever enter into any agreement, conspiracy or understanding with the persons above mentioned, or other person or persons to kill Senator Goebel or any member of the legislature, or to use any violence or physical force against either said Goebel or any member of the General Assembly of Kentucky?

A. I never did.

46. Had you any knowledge, information or any intimation from any source whatever prior to the assassination of Senator Goebel that any number of persons or any person contemplated the assassination of Senator Goebel; or that any number of persons or any person contemplated to kill any member of the General Assembly

of Kentucky or the use or application of any physical force or violence towards any member of the General Assembly of Kentucky ; if you have any knowledge, information or intimation from any source whatever in respect to the matters above inquired about, please state in full when you received such knowledge, information or intimation, the person from whom you received the same and the time and place?

A. I did not nor did I have any knowledge, intimation or information of such a thing.

47. Previous to the assassination of Senator Goebel were you ever in any meeting with the persons aforesaid or other persons or person where there was proposed or suggested the raising of a row in the legislative hall and after the row got up for some men to shoot members of the legislature ; did you ever have any agreement or understanding with W. H. Culton, Caleb Powers, Charles Finley or other persons or person that you were to have some member or members of the legislature to raise a row in the legislative hall

75 and after the row got up for some men to shoot members of the legislature ; did you ever entertain such a scheme or any purpose or scheme of like or similar import ; was Representative Lilly or any other person, so far as you know or are advised, selected or spoken of to be the man to raise the row referred to in the foregoing question ?

A. I never was in any such meeting or had any such understanding with the parties referred to or with any one else at any place or any time ; nor did I ever entertain such a purpose or scheme ; neither Representative Lilly or any other person was ever spoken of in my presence as the man to raise a row in the legislature. Nothing of the kind was ever mentioned in my presence.

48. Prior to the assassination of Senator Goebel did you ever advise his being killed or acquiesce in or consent to any suggestion from any source of his being killed ; did you ever advise the killing of any member of the General Assembly of Kentucky or acquiesce or consent to any suggestion of the killing of any member of the General Assembly or the use of any physical force or violence against either Senator Goebel or any other member of the General Assembly—answer in full in respect to the several matters inquired about ?

A. I never did.

49. Are you acquainted with Luke Hampton a member of the legislature elected at the November election 1899 ?

A. I know him slightly.

76 50. Did you ever have any conversation with said Luke W.

Hampton some time in January, 1900, in which conversation you said to him, " You fellows have the executive chair behind you, and forty two of you rise up and demand your rights"—and in which conversation you said to him ? in response to a question asked by him, that you did not call out the militia because something was to be done before you had the right to call out the militia and in



which conversation you also said in substance that some one or somebody had to sacrifice life in that thing and that you could not leave your office and go into the legislature, and that in case you did your life was in danger—if you did have such conversation referred to by said Hampton, and whether or not you used the language imputed to you by him, state in full your recollection of said conversation and all that occurred in the interview or conversation with said Hampton?

51. Did Hampton have a conversation with you in the presence of William Haile just after the contest committee were drawn, in which conversation you stated in form or substance as follows:— ‘By God, you fellows sit over there and let them rob me’ and Haile responded in substance, that we had done the best we could—do you remember said conversation, if so state in full all that you said upon that occasion and state whether you made the statement imputed to you as above set out

A. I will answer the 50th and 51st questions together. I have no recollection of ever having but one conversation with this man Hampton in January, 1900. I do not know who were present.

77 I did not in that or in any other conversation use the expression, “You fellows have the executive chair behind you and forty two of you rise up and demand your rights,” nor did I say in substance something was to be done before I called out the militia, nor did I say in substance that somebody had to sacrifice life in that thing and that I could not leave my office and go into the legislature, that in case I did my life was in danger, nor did I say in the presence of William Haile “By God, you fellows sit over there and let them rob me.” As before stated I had but one conversation with this man Hampton shortly after the contest committee was drawn as I left my office one night and was passing through the reception room on my way home, several parties were in that room. Among them I noticed Hampton. Someone said something about the contest committee being packed against me. I said to Hampton that I felt that my interests had been neglected in the legislature and that my friends had not exercised the proper care and watchfulness over the drawing and had not attempted to watch and see whether the names of those on the ballots had been drawn were called or other names substituted by the speaker. I made it clear to him that I was very much dissatisfied on account of this neglect. He then asked me why I did not suggest to him what they should do. I said to him that that was a very foolish proposition; that it would be impossible for me to map out any course for them to pursue; that I could not anticipate what frauds would be attempted, but that it was their duty to be watchful and detect and expose all wrongs attempted. This is the substance of the entire conversation

78 that took place between myself and Hampton and no honest and truthful man would or could have put any other construction upon it. Mr. Haile might have been present on the occasion referred to.



52. Are you acquainted with Silas Jones who lived in Whitley county?

A. I have no recollection of ever seeing Silas Jones.

53. Prior to the assassination of Senator Goebel in January 1900 do you remember of having an interview with Silas Jones in your office in which interview you asked him why he was in the lobby and he told you he never came there armed and you said he had as well go home, and in which you also said "What in the hell are you doing here without arms?" State fully all you remember in respect to such alleged conversation and whether you used the expressions imputed to you?

A. I never had any such conversation with Silas Jones or anything like it.

54. Did Julian Kersey during the month of January, 1900, at any time deliver at your residence in South Frankfort any arms, if so, please explain the purpose of having said arms at your house, who brought them there and under what authority, and state in full all you know in connection with said incident?

A. I did not live in South Frankfort in January, 1900. I learned in some way, I do not remember now how, that possibly two guns were carried to my house about the 10th of December, 1899. Who ordered or took them there I do not now know. I gathered, however, that they were sent there on account of the intense political excitement and bitterness as a matter of protection to me in the event my home was assaulted by some partisans. I paid but little  
79 attention to it and never would have thought of it again if my attention had not been called to it.

55. Did you know E. G. Howard, and state whether or not you received from E. G. Howard the following telegram "Hagan Va. 5 (month not stated) W. S. Taylor, Frankfort. I have one hundred men subject to your order. Need expense money. E. G. Howard." If you recall receiving such a telegram please state if you recollect when the dispatch was received by you and explain to what it refers wherein it mentions that Howard had one hundred men subject to your order, state in full all you know or recall in respect to said telegram and if you received the same?

A. I do not recall whether I ever received the telegram referred to or not. I don't think I ever received such a telegram prior to the assassination of Senator Goebel. Just after the tragedy and during the intense excitement I received a number of telegrams and this might have been one of them.

56. On the morning of January 30th, the day upon which Senator Goebel was assassinated what time did you get to your office in the executive building and if you fix the time please state how you are able to designate such time?

A. I think I reached there some time between eight and nine o'clock, I cannot fix the time certain.

57. Upon the morning of the 30th do you recall having an interview in your office, the reception room or other place, with

a man named Howard, Elisha Howard, or some other Howard, in which interview Howard was urging you to call out the militia; if you had such interview with Howard please state whether or not F. W. Golden was present at any time during your  
80 interview with said Howard, and state whether or not in that interview, you stated to said Howard "I cannot call out the militia until something is done, you fellows go out and act, go out and act and I can get the militia, I have them ready." Please state in full if you recollect such conversation with said Howard or any conversation and whether or not you made the statement imputed to you as above set forth and state in full said conversation.

A. I had no such conversation and used no such expressions to said Howard in the presence of F. W. Golden or any one else at any time or anywhere and nothing of like import. A number of people did urge me to call out the militia and invariably I answered them that I was not authorized to do so under the law unless there was an outbreak or a riot and such a course was necessary. I did not believe in the use of militia unless it was absolutely necessary and all occasions when asked to call them out so expressed myself.

58. State whether or not you remember F. W. Golden accompanying you home to the executive mansion from the executive office some afternoon or evening in January, 1900, and state whether or not you recollect a conversation had between you and said Golden as he was accompanying you home, in which you asked Golden if "we had any member up in the legislature that could raise a racket" to which Golden responded that he thought Haile from Louisville would raise a racket, to which you responded "Would our men back him up if he would" and I told him that they would; and in which conversation you said to Golden, "Whart, it is horrible to think of killing men but it looks like Goebel and that gang  
81 will have to be killed or I will lose out and all the rest of these fellows will lose out"—please state if you had such interview and conversation and if so state in full the entire conversation had between you and said Golden and state whether or not you made the statements or expressions imputed to you by said Wharton Golden as above set forth either in form or in substance.

A. I am not sure but I believe on one afternoon in January, 1900 F. W. Golden without invitation on my part walked with myself and Captain John Davis to the executive mansion, but I positively note that neither at that time nor any other time did any such conversation ever occur. Nothing similar or of like import was ever said in any conversation between us.

59. In the 47th and 48th interrogatories, you were asked to make your statement in respect to an interview had between you and Luke Hampton, please state if during that interview or any part of it Wharton Golden was present and state whether or not at the close of the interview between you and Hampton, Wharton Golden said to you in substance "You need not insist on a man like that

raising a fight, I thought that Hampton was a Christian gentleman and would not raise a fight?" and you then asked him who would and he told you he did not know who would, and in which said conversation said Wharton Golden further stated "It seems like they all were backing down, that none of them didn't have any nerve" and in which conversation you further said if something was not done you would lose your office and in which conversation you further stated "and you young men, the boys that are expecting places, will lose as well as I will." State whether or not you

82 made any such statements in form or substance to Wharton Golden as above set forth or had any conversation with him in respect to the matters referred to—please state in full all you remember of such conversation and what part thereof, if any, is correctly stated by said Golden as above set forth.

A. I don't know whether Golden was present when I had the conversation with Hampton or not. But I do know that no such conversation as the one referred to in the question ever took place between Golden and myself at any time, or anywhere. No conversation of similar or like import in form or substance at any time or any place ever occurred between us. When I had finished the conversation with Hampton I went directly to my home.

60. Did you engage W. H. Culton to subpoena and secure the presence of witnesses on your behalf in the contest pending before the legislative committee, if so, please state what instructions you gave him at said time, and especially what instructions you gave to him in respect to the witnesses to be brought from Jackson county?

A. I did dot. The only thing I had to do with Culton in that connection was when he came to me and said that he had been selected to summon the witnesses in Jackson county and asked me to furnish him some money to meet expenses and I let him have one hundred and twenty five dollars.

61. Did you have any interview on the afternoon or evening of January 25th, 1900 with W. H. Culton, Walter R. Day and Caleb Powers or any or either of said parties, in respect to the return of the crowd which came down from the mountains on the on  
83 the morning of the 25th, if so please state in full as far as you recall, what was said in that interview by either yourself or Caleb Powers or Golden or Day?

A. I don't think I talked to Culton or Day about the matter. I think Mr. Powers and I did have a talk about their return. I don't recall all that was said. I think Mr. Powers among other things said that it would be rather severe for the men to be up two nights in succession. I said to him however that it was the judgment of our friends that it would be best for them to go that night.

62. Did you either on the 27th, 28th or 29th of January, 1900 have an interview with W. H. Culton in which interview W. H. Culton repeated to you a conversation he claims to have had with Powers in substance that Powers was getting tired and said they were not paying the men's expenses and they had not done what

they were brought down here to do and he was going to send them back home and that thereupon you responded that "Powers was a hot headed fool that could not wait" or "Powers is a God damned hot headed fool and won't wait until I am ready. When I am ready this thing will be settled as I promised, and you go back and tell them I will be responsible for their expenses." Do you recollect of a conversation had between you and W. H. Culton in respect to the matter above stated and whether or not you made the statements or expressions imputed to you as above set forth?

Let your answer be full and explicit in regard to all matters referred to in this question?

84 A. Neither on the 27th, 28th or 29th of January, 1900 or at any other time did I ever have an interview with W. H. Culton in which any such conversation in form or substance or of like import ever took place between us. Nothing of the kind was ever said or mentioned between us. Culton never brought me any such report and never said anything about Powers getting tired or about not paying the men's expenses or that the men had not done what they were brought to do or that he was going to send them back. Culton never mentioned such a thing to me nor did I respond and say in form or substance that "Powers was a hot headed fool who could not wait" or that "Powers is a God damned hot headed fool and won't wait until I am ready. When I am ready this thing will be settled as I promised and you go back and tell him that I will be responsible for their expenses." I want to repeat again that no such conversation ever took place and I never used in form or substance the expressions attributed to me.

63. State if on or about the 27th of January, 1900, or about the time that the Berry-Vanmeter contest was decided, whether you sent any message by W. H. Culton to the assistant adjutant general J. K. Dickerson or General Collier in substance to have the soldiers at the arsenal ready to come on a moment's call, if so, state what was your purpose and state the conversation in full?

85 A. I did not. I never on the 27th of January, 1900 or at any time send any such word to J. K. Dickson or to General Collier by W. H. Culton or any one else.

64. Did you pay W. H. Culton any money during the month of January for any purpose, if so, state for what purpose and as far as you can the amount thereof?

A. As heretofore stated, I let Culton have \$125 when he went to subpoena the witnesses for the purpose of paying their expenses.

65. Did you at any time after you were inaugurated governor or before have any conversation with W. H. Culton when Finley and Powers were present or when either of them were present in which you said in form or in substance "If we undertook to fight the matter out, and if they undertook to rob us, that would be a good way to settle the contest and that if Judge Hazelrigg and Judge Hobson were killed to appoint two other judges and settle the matter in our favor. State in full the entire conversation, if any?

A. I did not have any such conversation in form or substance with W. H. Culton or any one else when Finley and Powers or any one else was present at any time or under any circumstances. I never uttered such an expression or entertained such a thought.

66. Did you ever at any time have a conversation with said W. H. Culton in which there was any suggestion, proposal or discussion of the killing of either Judge Hazelrigg or Judge Hobson or other judges and the appointment of judges in their places on the court of appeals bench?

A. I never did.

86 67. Did you ever make any statement to W. H. Culton or any other person or ever suggest to W. H. Culton or other person, the killing of Judge Hazelrigg or Judge Hobson and the appointment of other judges to take their places on the court of appeals bench?

A. I never did to any one at any time or any where.

68. Did you have any conversation with W. H. Culton about the 9th of January, 1900 in which you requested him to get in Jackson county or other place and bring them to Frankfort twenty-five good and brave men or twenty-five good standing up men—if so, state the time and place and the conversation in full and whether you made the above statement or not and if you did request said W. H. Culton to bring from Jackson or other county twenty-five men, state in full the purpose of having said men in Frankfort and whether or not you communicated that purpose to Culton and stated to him the character of men to be brought to Frankfort?

A. Sometime in January I had the conversation heretofore related with Culton and paid him the money as before stated but I did not on the 9th of January or at any time, make the statements attributed to me in this question.

69. State whether pending the contest before the legislative committee you had conference with W. H. Culton in regard to said contest and the witnesses, and if so, whether those conferences were frequent or not and the purpose thereof and as far as you can recall what was said in said conferences?

A. I had no conferences with Culton pending the contest.

87 During that time I occasionally saw and spoke to him. I spoke to him just as I would to others whom I knew and met during that time.

70. State whether or not at any time you had an interview with W. H. Culton and Caleb Powers or John Powers or either of said persons where the matter of placing or disposing of men that had come from the mountains or other men, in the house of representatives was discussed and whether or not in that interview you directed or suggested that said men were to be placed in the house of representatives or in the State chamber, that they were to be armed and prepared to seat any men you wanted seated, and if the house of representatives or the senate did not seat him to kill any-

body in the house or any member of the house that might be desired?

A. No such conversation ever occurred and nothing of the kind ever took place.

71. Did you ever state to W. H. Culton at any time that you would pardon men if they killed policemen but not for carrying pistols if they were arrested; did you ever have any conversation with W. H. Culton on that subject?

A. I did not.

72. Did you at any time to W. H. Culton in explanation of your purpose in having men brought to Frankfort that you were expecting trouble in the legislative halls and that you wanted them there if trouble started in the legislature. Please state in full whether you had any such conversation and state all of said conversation and whether or not you used the expressions imputed to you as above stated?

88 A. I did not, nothing of the kind ever occurred.

73. State whether or not on the 18th, 19th or 20th of January you had any conversation in your office at Frankfort with Caleb Powers with reference to bringing the large body of men from eastern Kentucky to Frankfort, if so, state the purpose of the movement and the uses to be made of the men after they came to Frankfort and state whether the men were to come armed or not, and if armed, why was it decided that they should come armed, state whether they were to come in uniform or citizen's dress or whether they were to wear the uniform under the citizen's dress and further state why the men were sent back on the afternoon of the day of their arrival and state fully everything known to you in connection with the movement of the men referred to?

A. I have heretofore substantially answered this question. I will add that I did not contemplate, direct nor expect that any of the delegation would come in uniform in any way at all. I recall nothing of the kind having been said. It was suggested that if any of the delegation brought arms they should bear them openly and not concealed.

74. State whether or not you had any discussion with Caleb Powers in respect to calling out the militia and state whether or not in any conversation you had with Mr. Powers he expressed a preference to have the militia called out and state why you did not call out the militia and state whether or not in these conversations with Mr. Powers he expressed the opinion that conditions would be better preserved in Frankfort by the open use of the militia and

89 state what reasons you assigned to him why the militia should not be called out, and state whether or not you explained to him under what conditions you would call out the militia—please state in full in respect to the matters above referred to?

A. Mr. Powers often urged me to call out the militia after we had information or it had been circulated and talked that a lot of arms had been shipped to Frankfort and that an effort would be made to



dispossess us of the offices by force, Powers earnestly and persistently taking the ground that that was sufficient cause to justify the calling out of the militia and that that would be the best way to preserve order and protect our own interests. I at all times took the position that the executive had no right to call out the militia unless some overt act of violence occurred which would necessitate and justify the same. I said to Mr. Powers and all other persons who urged me to call out the militia, that in the event violence or force was resorted to in ejecting us from office, or a riot or outbreak came, I would call it out, and that the militia would be kept in readiness for such an emergency.

75. On the 29th of January or at any other time at your office in the city of Frankfort or other place, did you have a conference or interview with Henry E. Youtsey in reference to the killing of William Goebel?

A. I did not.

76. On the 29th of January, 1900 or upon any other day at your office in Frankfort or any other place, did Henry E. Youtsey tell you that Hockersmith or a man called Tallow Dick Combes was

90 ready to kill Mr. Goebel and desired an interview with you to which you made the following response in form or substance, "You could not trust a negro for fear he would be a spy and betray you, but if he would go into that room, (meaning the secretary of state's office) and kill Goebel, you would give him a pardon and send him to the mountains under a military guard and give him a chance to get away"—if you had such conversation with said Youtsey, state in full and state whether or not you made the statements either in whole or in part, in form or in substance imputed to you by said Youtsey?

A. No, no such conversation or anything like it ever took place at any time or anywhere between myself and Youtsey or any one else. I never saw Hockersmith or Tallow Dick Combes in my life and never heard of either until after the tragedy and never directly or indirectly had any communication with or knowledge of either of them. I did not know that such persons existed at that time.

77. Did Henry E. Youtsey make a call upon you at the executive mansion on the afternoon or evening of January 25th, 1900 and being received in the reception room on the left hand as you go in, and engaged in conversation with Mrs. Taylor when you met him, or at any time or place, and discuss with you a conversation Youtsey said he had had with one W. R. Johnson in regard to the killing of William Goebel—if so, state what was said at that time and all that was said?

A. No. Henry E. Youtsey did not on the 25th day of January, or at any time have any such conversation with me in form or substance or anything like that set out in the question. Nothing of the kind ever took place between us at any time or at any

91 place. I never heard him call W. R. Johnson's name in my life. I did not see Youtsey on January 25th, 1900. Yout-

sey was not at the executive mansion on January 25th, 1900. He never at any time made any suggestions to me that anyone wanted to shoot Goebel or that W. R. Johnson was a dead shot or anything like that. On the evening on January 27th, 1900 just as I started to retire as I passed the parlor door I met Youtsey as he was coming out. We spoke. He appeared somewhat excited and commenced talking about the unseating of Berry. He was bitter and denounced the act as an outrage and said that those responsible for it ought to be shot. His expressions surprised me. I then advised against such remarks telling him that such talk would do no good. I then told him I was tired and had started to bed. He then left and I went upstairs and retired. This was the only time I ever saw Youtsey at the executive mansion and the only conversation we ever had there.

78. Did Henry Youtsey on January 25th 1900 or at any time in the reception room of the executive mansion advise or inform you that he had had a talk with W. R. Johnson about the killing of William Goebel and in the course of that conversation did Youtsey say that some of the men about the place wanted to kill Goebel and that they would shoot him with a rifle that would shoot through fifteen inches of solid wood with a steel bullet and smokeless powder and that W. R. Johnson was a dead shot, if so state in full the conversation?

A. No. He never did. No such conversation in form or substance ever took place between us.

79. Did Youtsey come to you on the 29th of January, 1900 or at any time at your office or other place and say to you that either Hockersmith or Tallow Dick Combes or any one else wanted to kill Mr. Goebel and wanted to get your consent or to get you to confer with Hockersmith and Tallow Dick Combes in respect to such purpose or any other place, and if so state the circumstances and conversation in full?

A. No, he never did. Nothing like that ever occurred on the 29th day of January, 1900 or at any other time.

80. Did you ever at any time say to Henry Youtsey that if any person would go in the room and kill Goebel that you would pardon him or send him away under a military escort or did you ever say anything like that—if you did, make your statement in full?

A. I never did. Nothing of the kind occurred.

81. Did you at any time say to him that if any such person would go into the room and kill Goebel that you would pardon him or send him away under military escort or did you say anything like that?

A. No, I did not.

82. Did you on the 26th of January, 1900 at your office or elsewhere dictate a letter to Henry Youtsey directed to James B. Howard at Clay county Kentucky requesting his presence in Frankfort?

A. No, I never did. On January 26th, 1900 or at any other time

93 at my office or at any other place, dictate a letter to Henry E. Youtsey directed to James B. Howard at Clay county regarding his presence in Frankfort or anywhere else for any purpose.

83. Did you write James B. Howard or dictate a letter to said Youtsey to be written to Howard stating in such letter that the arrangements had been made and that Howard was to report to Youtsey at Frankfort Kentucky and that there was to be no delay and that he was to come right down here, that you were likely to be robbed of your office at any time and to report to Youtsey when he came? Did you write any letter of that character or dictate any letter to Henry Youtsey and send of that character or directed to James B. Howard?

A. I never did write James B. Howard a letter, and as I said before never dictated one to Youtsey to be directed to him and did not say in any letter to Howard that the arrangements had been made for anything or for him to report to Youtsey or that there was to be no delay or that we were likely to be robbed of our offices at any time. Nothing like that in form of words or substance was ever written by me to Howard or dictated to any one else for him.

84. Did you ever dictate such a letter to Youtsey in the form or word or substance on the 26th of January or at any time requesting James B. Howard to come to Frankfort or to any other place?

A. I never did.

94 85. Did Henry Youtsey write such a letter for you or bring to you to be signed by you or did you sign any such letter or send any such letter or have anything to do or have any knowledge of any such letter having been written?

A. No, I did not.

86. Did you know James B. Howard on the 26th of January, 1900, had you ever had any conversation with him or communication either direct or indirect with him up to that day?

A. I did not know James B. Howard on the 26th of January, 1900. I never met him until in February of that year, never had a conversation with him or a communication direct or indirect with him in my life prior to February, 1900.

87. Did you see James B. Howard on the 30th of January, either that day or night or have any communication with him that day either direct or indirect or have any knowledge or information of his being in the city of Frankfort on that day?

A. I did not see James B. Howard on the 30th of January, 1900 either during the day or night. I had no communication with him that day, either direct or indirect and had no knowledge or information of his being in Frankfort on that day.

88. State whether or not you ever granted any pardon to James B. Howard for the shooting of Mr. Goebel or for the shooting of old man Baker or for any other offense while you were governor of Kentucky or if you ever promised him at any time or under any circumstances to grant him a pardon for any purpose?

A. I never did. Never granted or promised such a pardon at any time or under any circumstances for any offense.

95 89. Did you direct Henry E. Youtsey or any one else to tell James B. Howard that you would under any circumstances grant him a pardon for any offense?

A. I never did.

90. Did Henry Youtsey at any time report to you any plan for the taking of Mr. Goebel's life by himself or by any one else to the shooting of Mr. Goebel or did you have any knowledge direct or indirect of either Henry Youtsey, W. R. Johnson, W. H. Culton, Hockersmith, Tallow Dick Combes or any one else was planning to or intending to take the life of Mr. Goebel or do him any harm or violence whatever before he was shot?

A. No, Henry Youtsey at no time ever reported to me any plan for the taking of Mr. Goebel's life by himself or any one else, and I had no knowledge direct or indirect of either Henry Youtsey, W. R. Johnson, W. H. Culton, Hockersmith, Tallow Dick Combes or any one else planning to or intending to take the life of Mr. Goebel or to do him any harm or violence whatever.

91. Did you at that time or place or any other time or place say to Youtsey that you had a telegram sent you by the sheriff of Madison county and that it was a long telegram and that it requested you to pardon a man out of the penitentiary, did anything like that occur between you and Youtsey?

A. I have no recollection of anything of the kind ever occurring.

92. Did you when Youtsey left follow him out on the porch and ask him never to tell a human being what had taken place

96 between you and him or anything like that?

A. No, I did not.

93. Did you know Frank Cecil, on the 30th of January, and if so, how long had you known him prior to that date?

A. I did not. If I ever saw Frank Cecil in my life I have no recollection of it. I saw many people during my canvass doubtless spoke to hundreds of people during that time, of whom I took only a passing note of and never recollected their names or faces. In this way I might have at some time met Cecil and I might have seen him about Frankfort but I have no recollection of ever speaking to him my life.

94. Did you see Frank Cecil on the evening of January 29th 1900 at your office or at the door of your office and have any talk with him?

A. I did not.

95. Did Caleb Powers come into your office on the evening of January 29th, 1900, and say anything to you about Frank Cecil or tell you what he should have said to Frank Cecil or refer to Frank Cecil in any way and did you tell Powers to tell Cecil that you wanted to see him?

A. No, I did not tell Powers to tell Cecil that I wanted to see him. I never heard Caleb Powers call Frank Cecil's name.

96. Did Frank Cecil in a few minutes after Powers left, come into your office or did he come into your office at all at that time and have any talk with you upon any subject?

A. He did not.

97. Did you see Frank Cecil in your office on the evening of January 29th, 1900, about five o'clock in the evening or any other time and place, did you say what do you think about what Powers said (referring to the killing of Mr. Goebel) and did Cecil say to you "I have not thought much about it" and did you say "if Goebel ain't killed they are going to rob me of my office" and did you further say "I have \$2,500 00 in campaign funds left and I will give it and a free pardon to any man that will kill Bill Goebel" and did Cecil say in reply "Governor, I am not in that business, do you think I am crazy or naturally a damned fool?" Did that conversation occur in form of words or substance at that time or place or in any other time or place between Frank Cecil and yourself?

A. No, Frank Cecil as I stated was not in my office on January 29th, 1900 at five o'clock or at — other time. I never uttered in form or substance one word which he attributes to me. I never said "What do you think about what Powers said" nor anything of the kind nor did he reply "I have not thought much about it" nor did I say "If Goebel ain't killed they are going to rob me of my office" nor did I say that "I have \$2,500 in campaign funds left and will give it and a free pardon to any man that will kill Bill Goebel" or anything like it nor did Cecil reply "Governor, I am not in that business. Do you think I am crazy or a damned fool?"—not one word of such conversation ever occurred between Cecil and myself. There is not a word of truth in the statements of Cecil referred to in that question.

98. Did you tell Cecil that you had \$2,500 or any other sum left from the campaign fund and that you would give that sum or any other sum to any man who would kill Mr. Goebel or did you tell him at that time or place or any other time or place that you would give a free pardon to anybody who would kill Goebel. Did you make any such statement in form of words or substance to Cecil?

A. I did not. I had not one dollar of campaign funds in my possession. I never made in form or substance such a statement to Cecil or any one else at that time.

99. Did you tell W. H. Culton at any time after the death of Mr. Goebel in your office to tell Henry Youtsey that if he would leave Frankfort and go to the Philippine islands that you would furnish him the money for him to go on? Did anything like that occur in form of words or substance between you and W. H. Culton or anything like it?

A. I did not. No such conversation in form or substance ever took place between us.

100. Did you at any time make any effort to have W. H. Culton

have Henry Youtsey leave the State of Kentucky and go to the Philippine islands or go anywhere else?

A. I did not.

101. State if you executed a grant of pardon to Caleb Powers; if so, state when and where and file if you have it, a copy of the said pardon; state the considerations and the reason which prompted you to grant the pardon to Caleb Powers and state whether or not the pardon was solicited by Powers and give in detail all the circumstances and facts relating to the grant of a pardon by you to Caleb Powers?

99 A. I did grant a pardon to Caleb Powers who was charged with complicity in the murder of Senator Goebel. The pardon was earnestly insisted upon by Mr. Powers and his friends. I did it for the following reasons:

I believed him absolutely innocent of any connection with the crime, second, the political excitement and feeling in the State was so high and bitter that I did not believe that any person charged with that offense could have a fair and impartial trial. I have no copy of the pardon.

102. Do you know Robert Noaks? Did you see him on the 25th of January 1900 and did you know whether or not he came to Frankfort with a large body of men from eastern Kentucky on the morning of January 25, 1900?

A. I did not know Robert Noaks on the 25th of January, 1900, now do I know whether he came with the body of men from the eastern part of Kentucky or not.

103. State whether or not on the 25th of January at any time, Robert Noaks was in your private office; state whether or not on the 25th of January, at any time during the day, said Robert Noaks was in your office and there disarmed himself and did you see him on said day attempting to disarm himself by taking from his person one or more pistols which he slipped in or attempted to slip in a small wardrobe or closet in your office?

A. Robert Noaks was not to my knowledge in my office during any part of the day of January 25th, 1900. I never saw him attempt to disarm himself. I never saw him take one or more  
100 pistols or any other kind of weapons from his person and put some in a wardrobe or closet in my office.

104. Did you at the time above designated see Robert Noaks in your office disarming himself and say to him in form or substance, "Noaks those are nice plaything- you have" to which Noaks responded, "Yes" "I would just like for you to watch these and not let them take them out of there until I get back," to which you assented and then Noaks slipped the revolvers in the wardrobe or closet and covered them up with some papers and then left the office—please state in full whether Noaks was in your office at the time stated and whether or not he made to you or you to him any of the statements imputed to each of you, as above set forth?

A. I have already stated that Robert Noaks was not in my office



on January 25, 1900, but I will state it again. No such conversation ever occurred between us. Nothing in form or substance like it. Nothing of the kind occurred.

105. What was the relative strength of the two parties in the General Assembly in the session of the legislature held in January 1900?

A. I do not recollect the relative strength of the two parties in the General Assembly in 1900.

106. Which party had a majority upon joint ballot, and what was that majority?

A. The Democrats had a small majority on joint ballot. The exact majority I do not remember.

107. Was there any division among the Republican members so far as you were advised, upon the contest between you and Mr. Goebel?

101 A. None that I ever heard of.

108. Was there any division among the Democratic members so far as you were advised between you and Mr. Goebel—if so, state how you were so advised and all the information you have upon the subject?

A. Yes there was. I was informed and it was generally understood that several Democratic members of the assembly were opposed to Mr. Goebel's contest. I think some of them told me so. My information came principally from my friends who were looking after my interest.

109. State if you on January 29th or 30th were informed or advised that any member of the Democratic members would support you in the contest between you and Mr. Goebel, if so, how many and how did you receive your information and advice upon that subject?

A. I was advised almost every day until after Mr. Goebel was shot that I would receive a number of Democratic votes in the final vote on the contest, and I sincerely believe I would had not the assassination of Senator Goebel occurred.

110. State whether on the days aforesaid you were advised that the contest would be decided in your favor, state the source of your advice or information and state whether or not you then believed the advice and information received by you and state whether or not on said days or either of them, you so expressed yourself to your friends and advisers?

A. Yes, I received that advice and believed it.

111. State if you are advised that you are under indictment for being an accessory before the fact to the murder of William Goebel, if so, state whether or not you left the State of Kentucky before or after the return of said indictment. State in full the consideration and reasons which actuated you to leave Kentucky and the reasons and considerations which controlled you in refusing to return to Kentucky; please state fully and explicitly in respect to the matters above required about?

A. I have information that I am indicted. I left the State some time after the indictment was returned but before it was made public. I left because I believed the political feelings were so bitter and intense that I could not have a fair and impartial trial.

112. If you know any facts relative to the guilt or innocence of Caleb Powers, charged with being an accessory to the murder of William Goebel, which you have not already stated or referred to herein, please state in full such other facts or circumstances?

A. Nothing else now occurs to my mind. I wish however to mention a conversation which occurred between myself and Mr. George Hemphill concerning which he testified about in the James Howard trial. I did say, substantially, to Hemphill not to be hard on Youtsey in expressing opinion, but I had no reference to his statement before the grand jury. It occurred in this way: Hemphill and myself were discussing the probable innocence or guilt of Youtsey in connection with the assassination of Goebel. Hemphill expressed the opinion that Youtsey was guilty when I suggested to him not to be too hard on Youtsey; that he might be innocent and that he might do him an injustice. This is all the conversation I ever had with Mr. Hemphill on the subject.

Since answering question No. 14, I have found the certificate of election referred to therein. It is — the words and figures as follows:—

Commonwealth of Kentucky.

FRANKFORT, Dec. 9th, 1899.

The undersigned, a board for examining and canvassing the returns of an election held on Tuesday, the 7th day of November, 1899, for governor of the State of Kentucky, do certify that William S. Taylor received the highest number of votes given for that office, as certified to by the secretary of state and is therefore, duly and regularly elected for the term prescribed by the constitution.

(Signes)

WILLIAM PRYOR, Chairman,  
W. T. ELLIS, Member,

State Board of Election Commissioners for  
the Commonwealth of Kentucky.

Attest:

C. P. CHENAULT,

Secretary of State Board of Election Commissioners.

104 1. What is your age, occupation and place of residence?

A. I will be fifty years old the 10th day of next October. I reside in Indianapolis, Indiana. I am a lawyer.

2. Are all of your statements in the foregoing answer made from your personal knowledge? If not, which of them are made from information or belief and what is the source of your information or the foundation of your belief?

A. All are made from my personal knowledge except as I have indicated.

3. Have you any interest in this action, direct or indirect? If any, what is it?

A. I have no interest in this action other than the truth be known and that justice be done.

4. Have you stated all you know concerning this action? If not, state what you have omitted?

A. I have stated all that I now recall, all that the questions suggested.

(Signed.)

W. S. TAYLOR.

105 STATE OF INDIANA, }  
County of Marion, } ss.

I, A. C. Metcalf, a notary public in and for the county and State aforesaid, do certify that the above and foregoing deposition of William S. Taylor was taken before me at my office at room 51 court house in the city of Indianapolis, county of Marion, in the State of Indiana, on the 31st day of July, 1903, upon the interrogatories hereto annexed; that said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his testimony; that the testimony of said witness was written by me in his presence, read to and subscribed by him in my presence. I further certify that at the taking of said deposition neither party was present in person nor represented by agent or attorney.

A. C. METCALF,  
Notary Public.

My commission expires on the 14th day of March 1904.

A copy.

Attest: *attest.*

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

106 STATE OF KENTUCKY, }  
County of Scott. }

In the Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. }  
CALEB POWERS, Defendant.

The deposition of W. J. Davidson, taken upon the interrogatories and cross interrogatories on the 1st day of August, 1903 at Indianapolis, county of Marion, State of Indiana, to be read as evidence in an action between Commonwealth of Kentucky, plaintiff and Caleb Powers, defendant, pending in the Scott circuit court. Deponent being of lawful age, and first duly sworn, deposes as says,

1. State your name, age, residence and occupation?

A. W. J. Davidson, age forty eight, residence, Indianapolis, Ind. occupation teaching.

2. Were you ever a resident of the State of Kentucky, if so, when and where did you reside in said State?

A. Yes, Somerset, Ky. was my home until the spring of 1901. I had a temporary residence at Frankfort, Ky. lasting from late in December 1895 until early in March 1900.

3. While a resident of the State of Kentucky did you ever hold any official position, if so, state the same?

A. I did, I was county surveyor of Pulaski; county superintendent of common schools of that county; superintendent of public instruction of Kentucky for four years, and assistant secretary of state for a few weeks. When I was appointed to the last named  
107 position it was understood that I was to resign at the pleasure of the secretary the place, he said, having already been promised to his brother who was not then ready to take charge.

4. While a resident of Kentucky, to what political party did you belong?

A. Republican.

5. Where did you reside during the month of January 1900, and what relation or connection had you with the secretary of state's office?

A. Frankfort, Ky. as set out in answer to question No. 2 and was assistant secretary of state.

6. Q. Did your official position, if any you held, require you to have an office in the executive building at Frankfort?

A. It did. In the reception room of that building.

7. Q. State where you were at the time of the assassination of William Goebel on January 30, 1900?

A. At the assistant secretary's desk in the reception room between the private offices of the governor and the secretary of state.

8. Q. How were you advised of said assassination, where were you at that time and who were present?

A. I heard the shots, but did not learn what they meant until some one came into the reception room a short time afterwards and said Mr. Goebel had been shot. I think this was Leander Guffey. I furnished Detective Armstrong a list of those persons in the reception room at the time the shots were fired. It would no doubt  
108 be more reliable than one made now. As I remember. The following persons were in the room with me at the time, possibly one or two others, J. B. Matthews, R. M. Miller, Geo. R. Hemphill, Mack Todd, J. M. Hardgrove, stenographer Stone, Ben Rowe, and Capt. John Davis, who had just delivered the mail.

9. Q. If you were in the executive building at the time you heard of the assassination of William Goebel please state in full whom you saw at that time, give name, what each did, what yourself did, and state in full all conversations or statements that you heard by the

various parties that you saw at that time. In answer to the foregoing question please be full and explicit?

A. At the time I heard of the assassination of William Goebel I saw the persons named in answer to question No. 8 and such others as had come into the reception room in the meantime. As I now recollect Henry E. Youtsey, pistol in hand in his shirt sleeves and bare headed was the first to come in from the hall way or outside. He was apparently unable to tell who had been shot. W. S. Taylor came in through the door leading into the governor's private office very soon after the shots were fired, demanding to know what the shooting meant. When it was learned that Mr. Goebel had been shot much excitement and confusion followed. Things happened in rapid succession and it would be impossible at this distance for me to detail occurrence in anything like consecutive order. Some one said excitedly, that we would all be mobbed and that we should all prepare to defend ourselves, or something to that effect.

109 This increased the excitement and confusion. Another suggested that some guns would be found in the private office of the secretary of state and an effort was made to get to them. I endeavored to unlock the door leading from the reception room into the private office of the secretary, but found it secured or bolted on the opposite side. I then went around to the door leading from the hall way into the private office, but could not get in that way. I again tried to get in the private office by the door between the reception room and that room but could not. About that time Henry E. Youtsey struck the lock a heavy blow with a hatchet. In the mean time someone, I think J. B. Matthews, who had been outside and returned reported that a mob was forming or was said to be forming outside the public grounds to raid the executive building and kill everybody in it. This added to the confusion and excitement. Soon Matthews effected an entrance into the private office through the transom over the door between the two offices. I was not, I think, the first to enter the office after Mr. Matthews had opened the door but I went in soon afterwards. As I remember when I got into the room the window on the south side nearest the west corner of the building was slightly raised, perhaps four or five inches and the shades were drawn down. The office desk was in front or nearly in front of the door leading into the hall way. Someone, I think, Mr. Matthews distributed the guns found in the private office, three or four of them, to persons in the reception room for use in case an attack was made on the building. In the meantime several other persons had come in. J. B. Matthews, I think first, took charge of the defense of the building providing an attack should be made on it, but afterwards Capt. Sharp took the matter in hand. After a time just how long I am now unable to state, a squad of militia arrived from the arsenal and took charge of the capitol grounds.

10 Q. Were you in the secretary of state's private office in the

executive building or in the reception room between the governor's office, the secretary of state's office on the afternoon or evening of the 30th of January 1900, the day on which Mr. Goebel was shot, and while in there you were introduced to James B. Howard by W. H. Culton, if so, state in full what occurred at that time, and what conversation was had between you and said parties or either of them?

A. I was in the reception room between the governor's private office and the private — of the secretary of state most of the time during the afternoon of the day Mr. Goebel was shot, but I was not introduced to James B. Howard by W. H. Culton, or any other person at that time and place, nor was I ever introduced to James B. Howard by any one at any time or place. I never saw James B. Howard in my life to know him.

11 Q. Did you see James B. Howard either in secretary of state's private office or the room between the governor's office and the secretary of state's office, or at all, on the evening or night of January 30, 1900, and were you introduced to him by W. H. Culton. If so, state in full what conversation was had between you and said parties or either of them?

111 A. I did not. I never saw James B. Howard at any time to know him and I do not now recall that I then knew there was such a man as James B. Howard.

12 Q. Were you present at any time in an interview with James B. Howard when W. H. Culton was present in the secretary of state's office, the reception room of the governor's office or any other place when in your presence James B. Howard showed W. H. Culton any cartridges and at the same time said Howard said to Culton that they were pistol or Winchester cartridges or that they were 45 calibre, or did said Howard at such interview state in your presence to Culton or to you in the presence of Culton that he had been to the hotel and that if the ball with which Goebel had been shot had had something on it Goebel would have died instantly but damn him he would die anyhow. Did James B. Howard in your presence on January 30, 1900, or at any other time make to Culton or to you either in the secretary of state's office or the governor's reception room the statements as above set out, or at any other time or at any other place, if so, state in full what occurred between the parties in respect to the matters referred to?

A. No; I was not, and nothing of the kind in form or substance ever occurred at any time or place in my presence between James B. Howard and W. H. Culton, as shown in answer to question 11.

13 Q. Were you in the reception room of the governor's office during the morning of January 30, 1900 and before Mr. Goebel was shot, if so, state whether or not you saw Henry Youtsey pass through that room and into W. S. Taylor's office, if so

112 state when and who was present at the time in the reception room and state what occurred if anything at that time and whether or not you had any conversation with said Youtsey?



A. I was in the reception room of the governor's office during the morning of January 30th 1900 and before Mr. Goebel was shot. I came to my desk in the reception room early that morning and do not remember to have been out of the room prior to the assassination, except possibly once for a few minutes at the auditor's office to deliver a roster of the names of those in the office, from which the *parole* was to be made out. I did not see Henry E. Youtsey pass through that room and into W. S. Taylor's office that morning, nor did I see him at all in the reception room or elsewhere that morning before Mr. Goebel was shot. I had no conversation with Henry E. Youtsey that morning.

14 Q. State whether you had occasion to go into the private office of the secretary of state on the morning of January 30th 1900, if so state what was the condition of the door as to whether it was locked or not locked, fastened or not fastened and if the same was fastened or locked please state how the same was fastened or locked?

A. Soon after learning that Mr. Goebel had been shot I tried to get into the private office of the secretary of state but found the door fastened or bolted on the inside. It could not be opened from the reception room, as I stated in answer to question No. 9.

113 15 Q. State whether or not on the morning of January 30th 1900, and before the assassination of William Goebel, you saw Henry Youtsey pass through the reception room into the private office of the secretary of state, through the door, leading from the reception room into the private office of the sec'y of state if so, state at what time you saw him, who were with him, if any one, and what he said, if anything at that time, please state fully in respect to the matters above inquired about?

A. I did not. I did not see anybody enter the private office of the secretary of state on the morning of January 30th 1900, after Mr. Powers left. As I remember, that morning a short time before the train was due from Lexington Mr. Powers came to my desk with his over- on his arm and said he had decided to go to western Kentucky and passed back through the door into his private office and closed it after him. I did not see it opened any more that morning till Matthews opened it after breaking in the transom after the assassination. Henry E. Youtsey did not pass through the door after I arrived at the office on the morning of January 30th, 1900, and before Mr. Goebel was shot.

16 Q. State where you were during the entire morning of January 30th 1900, before the assassination of William Goebel?

A. I came to the office early and remained at my desk as stated in answer to question No. 13, till I heard of the assassination of William Goebel. The time was a busy one with the assistant secretary of state, issuing commissions to notaries public and

114 performing other duties connected with the office, and it was my custom to work early and late. My desk sat against the south wall of the reception room and near the middle window of that room.

17 Q. During the morning of January 30th, 1900, before the assassination of William Goebel did you observe or see any man come out of the private office of the secretary of state through the door leading from that office to the reception room and go into the governor's office, if so, state fully in respect thereto and describe the person and state whether or not you knew him?

A. No; I did not.

18 Q. Did anything happen that called your attention to the condition of the door between the private office of the secretary of state and the reception room during the morning of January 30th, 1900, if so, state fully the incident or the circumstances and state fully what was the condition of the door at that time?

A. Nothing special happened to call my attention to the condition of the door between the private office of the secretary of state and the reception room where I was during the morning of January 30th, 1900, as I recall, except what happened after the tragedy occurred.

19 Q. Do you know Wharton Golden and Caleb Powers and did you know either or both of them on January 30th, 1900, or prior thereto and if so, how long had you known them?

A. I knew both Wharton Golden and Caleb Powers on January 30th, 1900 and had known them for some time prior thereto.

115 I knew Caleb Powers as county superintendent of Knox county before he became a candidate for secretary of state, but I had seen him but a few times as I remember, when he came to Frankfort as secretary of state. I cannot say when I first saw Wharton Golden. He was appointed a guard in the penitentiary some time after I became superintendent of public instruction and it was during that time I presume, that I first became acquainted with him.

20 —. During the month of January, 1900, and before the assassination of Mr. Goebel, did you have any conversation with Wharton Golden in respect to Eli Farmer, if so, state when and where that conversation occurred?

A. I do not remember to have had any conversation with Wharton Golden during the month of January 1900, in respect to Eli Farmer.

21 —. Did you, on January 30th, 1900, or at any time tell Wharton Golden and Caleb Powers or either of them, that Eli Farmer would be down to Frankfort on a certain night or any night, or at any time, if so state what communication you made to said parties or either of them, and whether you made the statement to them or either of them, as above imputed to you?

A. I did not. I had no such conversation, in form or substance, with Wharton Golden and Caleb Powers, or either of them with respect to Eli Farmer on the 30th of January, 1900, or at any time.

22 Q. During the month of January 1900 and before the assassination of Mr. Goebel, had you any knowledge or information that Eli Farmer would be in Frankfort?

116 A. I did not. I had knowledge that Eli Farmer was in a distant part of the country at that time engaged in letting mail contracts.

23 Q. During the month of January, 1900, or at any other time, had you any knowledge or information that Eli Farmer would be in Frankfort for the purpose of taking the life of William Goebel, or any other purpose, or did you have any knowledge or information that Eli Farmer wanted to take the life of Mr. Goebel, or did you have any knowledge or information on said subject, or did you state to Wharton Golden upon the occasion above referred to or at any time, in form or substance, that Eli Farmer would be a good man to kill William Goebel or anything of like import and did you make any such statement to Wharton Golden or did you have any conversation with Wharton Golden relative to Eli Farmer, if so, state what that conversation was, and whether or not you made the statements to Wharton Golden as above imputed to you?

A. I had not. I had no knowledge or information that Eli Farmer would be in Frankfort for the purpose of taking the life of William Goebel or any other person, nor did I have knowledge or information that Eli Farmer wanted to take the life of William Goebel or any other person. I had no information that Eli Farmer would be in Frankfort at any time for any purpose. I did not say to Wharton Golden on the occasion referred to or at any time, in form or substance, that Eli Farmer would be a good man to kill William Goebel or anything of like import. I had no conversation with Wharton Golden relative to Eli Farmer.

117 24 Q. Do you know, and did you know in January, 1900, a man by the name of Dr. W. R. Johnson?

A. I remember to have seen a man who was called Dr. Johnson a few times about the executive building in Frankfort, Kentucky, in January 1900.

25 Q. Did you at any time within ten days before Mr. Goebel was shot or at any other time open the door leading into the private office of secretary of state and let Henry E. Youtsey and W. R. Johnson, or either of them into the office of the secretary of state, or did you let or permit Henry E. Youtsey to go into said office alone with Mr. Johnson either through the door leading from the hall into Mr. Powers' office or leading from the reception room into Caleb Powers' office, if so, state in full all that occurred at the time and under what conditions and circumstances said Youtsey with said Johnson or said Youtsey alone was let into said office?

A. I did not. I never, at any time, opened the door and let Mr. Johnson and Henry E. Youtsey, or either of them into that office for any purpose, and never was requested by either of them to be allowed to go into said office.

26 Q. Did you know in the month of January, 1900, and before the assassination of William Goebel a colored man Hocker Smith or a colored man by the name of Tallow Dick Combs, or either of them?

A. No. I did not. To the best of my knowledge I never saw either of these colored men.

27 Q. Did you, at any time, during the week preceeding the day Mr. Goebel was shot, or at any time commit or let Henry Youtsey in company with a colored man by the name of Hoeker  
118 Smith or Tallow Dick Combs or other colored man enter the private office of Caleb Powers, or did you let said Henry E. Youtsey, Hoeker Smith or Tallow Dick Combs or other colored man in company with said Henry E. Youtsey enter said private office of said secretary of state prior to the shooting of Mr. Goebel?

A. No. I did not. I never let Henry E. Youtsey, Hoeker Smith, Tallow Dick Combs or other colored man enter the private office of the secretary of state prior to the shooting of Mr. Goebel, as described in the question nor was I ever requested to do so.

28 —. Did you at any time prior to the 25th of January, 1900, or thereafter, or at any time, have a conversation with Henry E. Youtsey in respect to letting W. R. Johnson enter the private office of Caleb Powers?

A. No, I never did.

29 —. Did you on the 25th of January 1900, or at any time, prior thereto, or at all, have a conversation with Henry E. Youtsey in which you stated to him in substance or in form to an inquiry by him that you felt badly and did you further say that in form or in substance, "It looks like only a question of time when we will lose our places," and at said time did Youtsey tell you that Governor Goebel was at the head of the contest and if he had not contested for the office the balance of the officers would not have contested, and did you say in that conversation in any connection referring to

Senator Goebel that the "damn son of a bitch ought to be  
119 killed," and did Youtsey then say to you "Suppose I come to you for that purpose and wanted possession of the room (meaning Powers' office) can I have it" — did you say yes, and did Youtsey then say "I will come to you and say we ought to hold a meeting in the room," and did you say "All right any time you come you can have the room, open the door and walk in;" did you ever have any such interview or conversation with Henry E. Youtsey a week prior to the shooting of Mr. Goebel or at any other time at your office or in Powers' office — in any other place; if so what part of said conversation occurred and what part didn't occur and whether or not you made the statements imputed to you and whether or not Henry E. Youtsey made the statements above set forth, state in full if you recollect the entire conversation, if you had any such conversation with said Henry Youtsey?

A. No. No such conversation was ever had between us, either in form or substance at any time or in any place, there is not one word of truth in that statement.

30 Q. Did you know of or take any part in securing the presence of what is termed the "mountain men," at Frankfort on the morning of January 25th 1900, if so, state what part you took in such

movement or in promoting such movement and state the aims and purposes of said movement?

A. Before leaving Frankfort on his trip home, as he said, prior to the coming of what is termed the "mountain men," to Frankfort on January 25th 1900, Mr. Powers said to me that he, Governor Taylor and probably others thought it would be a good thing to have a large mass meeting held at the state house to petition the legislature not to unseat the Republican officers, and that he had decided to go to his home section to get all he could to come. He asked me, I think, to go to my home at Somerset and have a crowd come from Pulaski county but I was busy and declined to go. I was in no meeting or conference at which the propriety or purpose of bringing the men in question was discussed nor was I to my knowledge ever appointed or named as captain of such as should be brought from Pulaski county. On the evening of January 23rd, 1900, I in company with M. H. Thatcher, wired Mr. Powers that mass meeting had been abandoned and to bring no men, or something to that effect. This was done at the request or suggestion of Governor Taylor, who said the mass meeting had been called off or postponed. I got no answer to my telegram but had information later that the message reached him too late for him to act on it.

31 Q. State whether or not you know Capt. Stephen Sharp, and if so, did you have any conference with him in regard to the presence of said mountain men in Frankfort, relative to a meeting of same on the 25th day of January, 1900, if so, explain — met Sharpe, what information you gave to him and what action Capt. Sharpe took upon such information so furnished by you?

A. I do. On the afternoon of the day before the "mountain men" came to Frankfort, Governor Taylor asked me to see Capt. Stephen Sharpe and request him to act as presiding officer of a mass meeting, which, he said, would be held next morning at or near the State house to protest to the legislature against unseating the

121 governor and lieutenant governor. He said, in substance, that Mr. Powers had received information that the mass meeting had been called off or postponed too late to stop his delegation, and would be in Frankfort next morning. He said he wanted a prominent and influential man and a Democrat to preside at the meeting and explain its objects and that he considered Mr. Sharpe such a man. I went to Lexington that evening, Jan. 24th, and saw Mr. Sharpe, as I now remember I met him in the lobby or public room of the Phoenix hotel in that city, and delivered Taylor's message substantially as detailed above. I think he agreed or promised to come to Frankfort the next morning for the purpose named.

32 Q. Do you know how Capt. Sharpe happened to be the presiding officer, if he was the presiding officer of said meeting held at Frankfort on the 25th day of January, 1900, was he such officer at your solicitation, please state where you met him and what was said

and what communication you made to him in reference to said meeting?

A. I did not attend the meeting referred to in this question, but had information that Capt. Sharpe was present and presided. The answer to the rest of this question is included in the answer to question No. 31.

33 Q. Do you know of any effort to secure a body of men to go to Frankfort from western Kentucky or other portions thereof after the 25th of January 1900?

A. Yes, I knew Caleb Powers started to western Kentucky on the morning of January 30th, 1900, as they said, to secure a body of men for the purpose indicated in this question.

122 34 Q. Were you present at any meeting or conference on the afternoon or evening of January 29th with Caleb Powers or others, wherein the policy of securing the presence in Frankfort of a body of men from western Kentucky and other parts of the State was discussed please state who were present at that conference and all that was said by other parties and further state what was the conclusion of the meeting?

A. On the afternoon of January 29, 1900, the day before the assassination Mr. Powers asked me to meet him and others that evening to discuss the policy or propriety of securing or attempting to secure the attendance at Frankfort of a large body of men from western Kentucky. I met Walter Day and Caleb Powers at the secretary's office that evening and the policy of such a course was discussed. Mr. Powers explained in substance that Governor Taylor favored having a large crowd of people come from that section of the State to show their interest in the contest but that he, himself, was not fully decided whether it was worth while to make the effort. He said, too, that he had information from Taylor that someone, I think Leslie Combs, had raised considerable funds to meet expenses of the contest and that that fund or a part of it might be had to defray the expenses of the contemplated trip. As I remember, Lou Butler was present at some time during the talk, and agreed to help get up the crowd if the plan was carried out, or said he was going for that purpose or something of the kind. No definite conclusion was reached that evening as I recall but Mr. Powers said he would deter-

123 mine early next morning what action he would take.

35 Q. On the morning of January 30th, 1900, had you any conference with Caleb Powers or other persons with reference to the movement of such body of men to Frankfort, if so, state fully in reference thereto and what conclusion was reached and whether such conference so held was in pursuance of a suggestion on the afternoon before, state in full all you know in respect to such meeting and who were present and what was said by the parties and what conclusion was reached?

A. I do not remember to have had any further conference with Mr. Powers or anyone else — regard to this matter, but next morning



some time after I reached the office Mr. Powers came to my desk and said he had decided to go on the trip and that he was about to start.

36 Q. Did you ever, at any time, inform or advise Caleb Powers that Henry E. Youtsey, either alone or in company with Dr. Johnson, or either person had solicited you to allow him or them to enter the private office of Caleb Powers, if so, please state all you said to or advised Cable Powers with respect thereto?

A. No; I never did.

37 Q. State whether at any time you informed Caleb Powers that Henry E. Youtsey or other persons had applied to you for the uses of his private office for any purpose?

A. No, I never did.

124 38 Q. If in answer to the foregoing interrogatories you have omitted to state any fact relative to the guilt or innocence of Caleb Powers charged with being an accessory before the fact of the murder of William Goebel, please state such omitted fact or facts?

A. To my knowledge Mr. Powers took steps following the assassination to discover who committed the crime. He got J. B. Matthews, who was, at that time helping me and stopping at my house to take up the investigation and search out what he could in regard to it.

Cross-interrogatories propounded to W. J. DAVIDSON:

1 Q. What is your age, occupation and place of residence?

A. W. J. Davidson, teaching, Indianapolis, Ind.

2 Q. Are all your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information or belief and what is the source of your information or the foundation of your belief.

A. Yes; they are made from personal knowledge.

3 Q. Have you any interest in this action, direct or indirect, if any, what is it?

A. I have no interest, direct or indirect, in this action.

4 Q. Have you stated all you know concerning this action? If not state what you have omitted?

A. Yes.

W. J. DAVIDSON.

125 STATE OF INDIANA, }  
County of Marion, } ss:

I, A. C. Metcalf, a notary public in and for the county and State aforesaid, do certify that the above and foregoing deposition of W. J. Davidson, was taken before me, at my office at room 51, court house in the city of Indianapolis, county of Marion in the State of Indiana on the 1st day of August 1903, upon the interrogatories hereto annexed; that said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his testimony; that the testi-

mony of said witness was written by me in his presence, read to and subscribed by him in my presence.

I further certify that at the taking of said deposition neither party was present in person nor represented by attorney.

A. C. METCALF,  
Notary Public.

[SEAL.]

My commission expires on the 14th day of March 1904.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFEE, D. C.

126 STATE OF KENTUCKY, {  
County of Scott. }

In the Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs.  
CALEB POWERS, Defendant. }

The deposition of Charles Finley, taken upon the interrogatories and cross-interrogatories on the 1<sup>st</sup> day of August, 1903, at Indianapolis, county of Marion, State of Indiana, to be read as evidence in an action between Commonwealth of Kentucky, plaintiff and Caleb Powers, defendant, pending in the Scott circuit court:

Deponent being of lawful age, and first duly sworn, deposes and says:

1. State your name, age, residence and occupation?

A. Charles Finley; age thirty-eight years; residence, Indianapolis, Indiana though I have spent much of the time since last December in Martinsville, Indiana. I shall not be in Kentucky during August or September of this year.

2. Were you ever a resident of the State of Kentucky, if so state when and where you resided in said State?

A. I was a resident of Williamsburg, Kentucky up to March 6<sup>th</sup> 1900 except four years I spent at Frankfort as secretary of state.

3. While a resident of the State of Kentucky did you ever hold any official position, if so state the same?

A. I was elected a member of the General Assembly of Kentucky in 1893; I was elected secretary of state in 1895.

4. While a resident of Kentucky to what political party did you belong?

127 A. I have always been a Republican.

5. Were you in Frankfort at the time of the canvass of election returns in the fall of 1899, if so, state who conducted and made the canvass thereof?

A. I was. The canvass — made by the three State election commissioners, Messrs. Pryor, Poyntz and Ellis.

6. What was the character of the campaign preceeding the election in November 1899, in respect to party feeling and the public interest therein?

A. The campaign preceeding the election of 1899 was a very peculiar one. The feeling between the two factions of the Democratic party was bitter and intense. The leaders of the two factions denounced each other in the bitterest terms both through the press and on the stump. It was recognized that the Brown, or Independent, wing of the Democratic party could not hope to win and that the contest lay between the Republicans and the Goebel faction of the Democratic party; in spite of this however the great bitterness that was developed was not between Republicans and Goebel Democrats but between the latter and Brown Democrats. The Republicans were greatly aroused throughout the State and deeply interested in the result. The excitement throughout the State was unparalleled.

7. State whether or not there was any excitement aroused at Frankfort or prevailing throughout the State at the time of the canvass of the said returns, if so, describe the character thereof, so far as you may know, or have observed the same.

128 A. The excitement did not disappear with the election. On the contrary it rather increased, for it was soon rumored that, although the Republican ticket had a majority on the face of the returns, the three election commissioners would refuse to count the vote of enough counties which had given Republican majorities to obliterate the total Republican majority in the State and would give certificates of election to the members of the Goebel Democratic ticket. The effect of this was to keep excitement in the State at fever heat and to make Frankfort the focus of attention while the canvass of the vote was being made. Naturally this brought partisans of each side to Frankfort from all parts of the State. Also it brought the members of the two opposing tickets and their friends and supporters. The town was filled with eager, anxious, excited and angry men of all parties.

8. State the question before the board of election commissioners, involving the canvass of said returns which aroused public discussion and excitement, and also state how that question was decided by the board, also state whether the decision of said question was for any time supposed to be in doubt?

A. In brief, the question was whether the State election commissioners could, when sitting merely as a canvassing board, assume and exercise rights and powers belonging exclusively to a contest board. To be more specific, members of the Goebel Democratic ticket and their attorneys before the canvassing board, objected to the consideration by the board of the returns from several  
129 counties which had been certified to it. If their objections were sustained and the returns from these counties were ignored, it would leave a majority for the Goebel ticket. As I have indicated in my answer to question No. 7 as soon as it was ascertained

that the Republican ticket would have a majority on the face of the returns, it was rumored that the election commissioners would do this. Indeed, it was demanded of them by some of the Goebel Democratic ticket, by the members of that ticket and their friends that they do it. The board met late in November and sat till about the 10<sup>th</sup> of December before it completed its work. From the election till they had issued certificates of election to the members of the Republican ticket, the public was uncertain what the board would do.

9. Were you in Frankfort at the meeting of the General Assembly which was elected in November of 1899?

A. I was.

10. Were you in Frankfort during the early part of January 1900?

A. I was.

11. Did you take part or have any interest in the gubernatorial contest before the legislature and the committee thereof?

A. I had no direct or personal interest in the gubernatorial contest. The only interest I had was that every other good citizen of the State had. I had no official connection with the contest but I felt enough interest in it as a citizen to lend advise and moral support to the Republican contestee whom I believed to have been fairly elected.

12. Were you present at any meeting when arrangements were made to procure the presence of witnesses in said contest, if so state who were present and state in full what arrangements were entered into.

A. I was never present at any such meeting.

13. Did the contest before the legislature arouse any excitement at Frankfort or in the State, and was there any public manifestation of such interest at Frankfort or in the State and if so, state all you know in respect thereto?

A. As I have already stated, the excitement of the campaign did not subside after the election because of the rumor that the canvassing board would refuse to count returns from enough counties giving Republican majorities to leave a Goebel Democratic majority and issue certificates of election to members of that ticket. Neither did it subside when two members of the board issued certificates of election to the Republicans, for they immediately resigned when they had done so and the remaining member appointed two members to fill their places as partisan as himself and it was well understood that the candidates on the Goebel ticket for offices other than governor and lieutenant governor would make a contest before this newly constituted board and that Goebel and Beckham would contest before the General Assembly.

The assembling of the General Assembly brought to Frankfort 138 members of that party, mostly partisans. A large number of candidates for the various offices connected with the General Assembly and their friends, all partisans; the friends and supporters

of the contestants and testers for State officers, all partisans.

131 The town was filled with excited men; partisanism run high and Frankfort was the storm center of an excitement which extended throughout the State.

14. What part, if any, did you take in securing the presence of the mountain men at Frankfort on the morning of January 25", 1900, state in full your connection with said movement, and state in full its purpose and aim.

A. As I was going to the post office on the evening of Sunday, June 21", I was met by A. T. Siler who told me he had seen Caleb Powers at London that day and that arrangements were being made to take a crowd of men to Frankfort. I had heard it discussed several times in Frankfort that it would be a good move to have a mass meeting of citizens from the various parts of the State in Frankfort to memorialize the legislature. I heard it discussed as a monster gathering from all parts of the State on a given day and I heard it talked of as a series of mass meetings, on one day and another on a later day—the participants in each to come from different parts of the State. It was thought this would awaken the legislature to how deeply the people were aroused over the contest and that the moral effect would be good.

I was not surprised therefore when Siler told me that a movement of the sort was on foot. Siler also told me that Powers wanted me to organize and take charge of the Whitley county contingent. This I agreed to do.

It was late in the evening when I talked with Siler; but next day I went to work to make up a crowd. I sent men out through various parts of the country to ask men to go. I impressed  
132 upon these men that they must get only sober, steady, good men—that we did not want any toughs or men that would get drunk or in any way get into or cause trouble.

I did not like the arrangement for transporting the crowd to and from Frankfort and went to Louisville and made arrangements with the L. & N. railroad that were more satisfactory to me. After I learned that some of the men would bring guns I made arrangements for them to surrender their guns as soon as they got to Frankfort and get checks for them. After they came to Frankfort I did what I could to see that they were promptly and properly fed. I called them to order when they met to petition the legislature.

15. Were you in Frankfort on the morning of January 25", 1900, when the men from Bell and other counties from eastern Kentucky arrived?

A. I was.

16. Did you observe their demeanor and how the men conducted themselves during the day, if so, state fully your knowledge on this subject?

A. I did. I thought the crowd an unusually good humored and

orderly one, considering its size, and that they had been up all night without anything to eat and found poor preparations to feed or care for them when they arrived. I was in conference with friends at one of the hotels in the town when they arrived and did not know of their arrival till I went to Capital square. By that time the train on which they had come was gone and the men who had weapons were checking them at the agricultural commissioner's office. I believe every man who brought a weapon surrendered it and got a check for it.

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134 I saw no weapons in the hands of, or on, any man that day till late in the evening. About or a little after dark I heard a shot in the direction of the agricultural commissioner's office; I went at once to investigate. I found that a man had surrendered his check and gotten his gun and that it had been accidentally discharged. I told him he had no need for the gun, that his train would not go for an hour yet and that it was dangerous to have his gun in a crowd. I urged him to re-check it and induced him to do so. About seven o'clock I was in the commission- of agriculture's office. I was making a tour of the grounds and buildings to see



that the men knew what time their train was to leave and that none got left. The morning had been pleasant but it had turned cold before evening and I found the office crowded with men and a large fire burning. I found a man inside making a very incendiary speech. I interrupted him and said "I don't believe I know you;" he replied, "I am — Matthews of Covington." I said "You seem to want to fight." "By — I do," he replied. "Well," I said, "You are the only man here that does, the rest of us are all peaceable people." Then as I now recall it, I got on the table and made a speech to them. I said to them that we had come to Frankfort to petition the legislature; that we had done that and having done all we came to do we were going back home; that our train would start at eight o'clock. I begged them to remember that we were in a section of the State which professed to believe that mountain men were lawless and violent and to so conduct themselves as

to give no just cause for criticism and that it ought to be a  
 135 matter of pride with each one to so deport himself as to illustrate in the presence of these people that that was not true.

The temper of the crowd was indicated by the fact that Matthews remarks were heard in silence, while what I said was greeted with cheers and every sign of approval. The train pulled — at 8:36 p. m. Before that time, at eight or a little after, I made another round of the square and buildings to see that no one was being left. Then I went down to the depot where they were waiting to get on the train. There was a dense crowd there and a few, perhaps a dozen, shots were fired into the air by men who were drinking. I circulated among this crowd as best I could, urging them to be quiet and orderly, till the train backed up. After the train backed up I went through those cars west of the depot, suggesting to the men who had guns that it would be a good and safe thing to see that there were no loads in any of them, that a loaded gun was a dangerous thing in a crowded train. They cheerfully agreed to this and proceeded to unload any guns that were loaded. I got off the rear end of the hindmost car—which was just at Lewis street and the train pulled out at 8:36 p. m. In the morning after the men had checked their guns they had breakfast on the square back of the executive building. They came together in front of the capitol steps at 10:30 a. m. for the purpose of formally petitioning the legislature. I

called the meeting to order and in a brief speech stated  
 136 the object of the meeting. I reminded the men that we were all Kentuckians—proud of the State's past and hopeful for her future; that we had come to Frankfort not as revolutionists but as citizens and in the exercise of a right specially reserved to us by the "bill of rights of our constitution—the rights to assemble and petition those in authority over us; that although a few years ago Kentuckians had been divided in fratricidal war that there were in that crowd side by side, elbow to elbow, and equally interested in the present, men who had worn the blue and those who had worn the gray—united by the interest they had in the State's present and

future. I nominated Stephen G. Sharp for chairman of the meeting. He was unanimously elected. On my motion the chairman appointed a committee of five to prepare a memorial to the General Assembly. The committee retired and by and by reported the following which was read and adopted :

"We, Kentuckians, here assembled in token of all the "free and equal" men of Kentucky, do re-assert the great and essential principles of liberty and free government proclaimed in the bill of rights, not as derived to us therefrom but as "inherent."

Our property we may alienate from ourselves and our children, but our liberty is a heritage in us in trust for all generations and we may neither surrender nor encumber it."

We declare again the prerogative right of "freely communicating our thoughts and opinions" and to assemble together in a peaceable manner for our common good and the good of our fellow-men of Kentucky. More especially do we declare our right and authority, conferred on us by Almighty Power and not otherwise, of applying to those invested with the power of government, by either petition or remonstrance.

And therein we represent to them, our brethren of Kentucky, our agents in legislature convened, that the government of Kentucky is founded on our authority and instituted for our peace, safety and happiness and the protection of our property—our own and theirs and as well, that of the stranger within our gates.

We petition them, our proxies in the General Assembly to heed that there is peril hovering over all those things so dear to us and to them, and that calmness and prudence and wisdom need be invoked in order that truth and justice may prevail; and we exercise our right of "remonstrance" against their suffering themselves to be led into the temptations of partisan pride or party predilection in the crisis which is upon us. We beseech them to remember that their own just powers were loaned them by us at the polls, and that among those was the jurisdiction to decide judicially and by due process of law and not otherwise what was then our expressed will, not their present political preference.

We implore them that they do not on slight or technical pretexts nor flimsy or trivial causes hazard the subversion of that supreme law of the land, the will of the people.

We beg of them that they receive from the hands of our messengers and consider, and do not spurn or despise this, our earnest  
138 address, petition and remonstrance and that they by their considerate action protect, preserve and promote the safety and welfare and, above all, the honor of Kentucky committed to their keeping.

CHAS. FINLEY.  
CLAUD CHINN.  
DR. THOS. F. BERRY.  
A. W. NAZOR."

The original is in my possession and if the court so desire, I will file the same. The foregoing is an exact copy. A committee of two, consisting of the chairman, Stephen G. Sharp, and myself was appointed to present this memorial to the General Assembly. The meeting then adjourned. The lower house was then in session and we went almost at once to present the petition to that body but were not allowed to do so. And the next day we tried again but failed again. I have never addressed a more orderly body of men than that assemblage of petitioners.

If there was a weapon of any kind in the crowd I did not see it and I was high enough above them to see the entire crowd. After the adjournment they scattered about the capitol square and streets of the town.

17. Do you know why the men returned to their homes on the evening of the day of their arrival, if so, state fully all you know in respect thereto.

A. I know of no reason other than that they had done all they came to do and there was no reason why they should remain.

139 18. Were any men that came down on the morning of the 25<sup>th</sup> of January held over at Frankfort, if so, state what part you took, if any, in having such men remain over and the purpose in having said men to remain in Frankfort?

A. I know nothing of any of these being held over or kept in Frankfort. Some of those who came from my own town were college boys and some of these remained over.

19. Did you remain in Frankfort after the 25<sup>th</sup> for any time, and if so, how long?

A. Yes, I remained in Frankfort till the morning of the 29<sup>th</sup> of January, 1900.

20. Were you in Frankfort at the time of the assassination of Senator Goebel. State in full as far as you can who first appraised you of the assassination of Senator Goebel and where you were at the time?

A. I was in Louisville when Senator Goebel was shot. I left the office of Grinstead and Tinsley on the north side of Main street near Seventh at twenty minutes to twelve o'clock; I walked up to the next corner and then, I think I crossed to the south side of the street and walked on east; as I passed a cigar store, C. C. Bickel and Company's I think, I saw a placard hung out in front bearing these words: "Senator Goebel assassinated at Frankfort at 11:15 a. m." That was my first information of the crime.

21. Had you any connection with, or did you take any part in, any proposed movement to secure the presence of persons from western Kentucky, or other portions of the State, to appear  
140 before the legislature or come to Frankfort, if so, state in full all you did in respect to such movement, and the purposes and aims in securing the presence of such persons in Frankfort and what persons assisted or were to assist in getting up the movement?

A. I had no connection with any movement to bring a crowd of

men from western Kentucky to Frankfort except as stated in my answer to question No. 14. As I said there, I heard discussed in Frankfort, and possibly talked myself—about the advisability of having a mass meeting or mass meetings of citizens of the State at Frankfort, but it never materialized or took form till the movement was begun which resulted in the mass meeting of January 25", 1900. I have learned that an effort was made to bring a crowd from western Kentucky after January 25", 1900 but I knew nothing of it either before or at the time it was on foot and took no part in it.

22. Do you know whether Caleb Powers had any part in such movement, if so, state in full all you know in connection therewith?

A. I do not. I know nothing at all about it except as a matter of information.

23. Previous to the assassination of Senator Goebel had you ever been informed, and if so by whom, whether or not the Democrats or the Democratic leaders or those interested in the contest in behalf of the Democratic candidate, contemplated the use of any force for the purpose of driving and expelling the Republican officials from office;

141 and if so, state all you know in respect thereto, and state from whom you received such information, if you received any, and state if you were advised how the purposes of ousting the Republicans from their offices was to be executed, please state fully in respect to the matters herein referred.

A. 10. It was rumored in Frankfort, though I do not remember from whom I heard it, that as soon as the contests for the State offices should be settled in favor of the Democrats by the contest board or General Assembly, they would eject the Republican occupants by force, if they did not at once vacate, and take possession of the offices themselves. It was told there and possibly published in some of the newspapers of the State that cases of guns were being shipped into the penitentiary to be used in such a raid in case the Republicans resisted. It was also told that the upper stories of buildings fronting on the capitol square were arsenals of guns and ammunition from the windows of which the Democrats would fire upon the Republicans if they resisted the effort to dispossess them. I do not remember from where these reports came to me but I remember that they were freely talked among the republicans there.

24. Did you take any part in or have any connection with the assassination of William Goebel?

A. I took no part in it and I had no hand in it. I did not know it was going to be done, and had I been able to do so I would have prevented it.

25. Do you know W. H. Culton, F. W. Golden, Green Golden, John L. Powers, Caleb Powers, John Davis, Henry Youtsey, James Howard, Berry Howard, Harlan Whittaker, Richard Combs,

142 Frank Cecil and Frank Steele, or any of them, and if you are acquainted with either of the persons named, state how long you have known such person or persons, and explain your association with such person or persons and state fully your relation or

association with such person or persons during the month of January, 1900, and prior to the assassination of Senator Goebel?

A. I have known W. H. Culton since about 1895, I think. My recollection is that I met him while campaigning through Jackson county in that year. My relations with him were at all times about such as would exist between a man in politics and another man of the same party whose support he would rather have than his opposition. I might say they were always friendly without ever being intimate or confidential. I know F. W. Golden since 1896. My relations with him were about the same as with Culton, friendly without being intimate or confidential. I do not remember Green Golden, though I have no doubt I have met him; as we live in adjoining counties and have campaigned through Knox a number of times.

It is possible if I should meet him I would recognize him as a man I had before met but I would not know that his name is Green Golden. I might even recognize him as Golden and remember to have met him but I would not remember him as Green Golden.

I think I met Caleb Powers and his brother John L. Powers in 1893 when I was campaigning through Knox county as a  
143 candidate for the General Assembly. I know I met Caleb Powers then; for he was a candidate for a county office at the same time and we campaigned together. I have no recollection of having met either of them before that. After that Caleb Powers and I were friends though I never saw or knew much of John L. Powers. In 1896 Caleb Powers was again a candidate in Knox county and I stumped the country with and for him. I placed Caleb Powers in nomination in the convention which nominated him for secretary of state. We were friends during January of 1900 as we had been for years before. I met John Davis when he was made Capitol Square policeman by Governor Bradley or soon afterwards. We were always friendly but never confidential.

I met Henry Youtsey after he became stenographer to Auditor Stone a year or two before the close of his term of office. We were always friendly, nothing more or less than that at any time.

I do not remember to have met James Howard in my life, though I may have done so, as I have stumped through Clay county two or three times. I never saw him during January of 1900 at all or if I did did not know it was him.

I have known Berry Howard by sight and locality for a number of years but do not remember when I first met him. I knew him as a man who has been a candidate and is likely to be one again, know hundreds of men—well enough to be friendly and affable to him but not as an intimate.

I never saw Harlan Whitt-ker, Richard Combs, Frank Cecil or Frank Steel to know them or either of them.

As I have said before, however, I have stumped through  
144 Kentucky a number of times, have been in politics for a number of years and it is possible that I have casually met

them and have forgotten it. I could not pick either of them out of a crowd, however.

26. Were you ever in any meeting with the persons named in the foregoing question, or any of them, prior to the assassination of Senator Goebel, when the assassination of Senator Goebel was suggested or proposed—if so, state when and where and who was present.

A. I was not at any time.

27. Were you ever in any meeting with said persons named or any of them or other person or persons, before the assassination of Senator Goebel, when the assassination of William Goebel was suggested or considered by you or other person or persons?

A. I was not at any time.

28. Were you ever in any meeting with the persons aforesaid or any of them or other person or persons, before the assassination of William Goebel, when there was suggested or proposed, the assassination or the killing of any member of the General Assembly of Kentucky, if so state when and where and who were present.

A. I was not at any time.

29. Were you ever in any meeting with the persons aforesaid or other person or persons, before the assassination of Senator Goebel, when the use of violence or physical force against the General  
145 Assembly of Kentucky, or any member thereof, was suggested or proposed—if so state fully all you know in respect thereto.

A. I was not at any time.

30. Were you ever in any such meeting when the use of physical force or the resort to personal violence was suggested or proposed, if so, state fully in respect thereto.

A. Never at any time.

31. Did you ever enter into any agreement, conspiracy or understanding with the persons above mentioned or other person or persons, to kill Senator Goebel or any member of the legislature, or to use any violence or physical force against either said Goebel or any member of the General Assembly of Kentucky?

A. Never.

32. Had you any knowledge, information or any intimation from any source whatever, prior to the assassination of Senator Goebel, that any number of persons or any person contemplated the assassination of Senator Goebel, or that any number of persons or any person contemplated to kill any member of the General Assembly of Kentucky, or use or apply any physical force or violence towards any member of the General Assembly of Kentucky; if you have any knowledge, information or received any such intimation from any source whatever, please state in full whence you received such knowledge, information and intimation, the persons from whom you received the same, the time and place and make a full and explicit statement in regard thereto.



A. I heard of something of that sort—not that violence  
146 was contemplated towards Senator Goebel or any member of  
the General Assembly specifically, but that some persons were  
going to “start trouble”—but found on investigation that there was  
no truth in it. It was on Friday morning after the army of peti-  
tioners was there and before the legislature had assembled. A man  
who said he was from either Taylorsville or Taylor county, I don’t  
remember which and whose name I forget—if I heard it—came to  
me in or about the executive building and told me that a meeting  
had been held in the adjutant general’s office the night before at  
which the matter was fully discussed and it was determined to “start  
trouble”—(that’s the way he expressed it)—that committees had  
been appointed and all arrangements made. I said “Well, come  
with me and I’ll see if I can’t put a stop to that” or words of similar  
meaning. We started to the adjutant general’s office—going around  
in front of the building we met W. H. Culton; I stopped him told  
him what the man had told me and asked him if he knew anything  
about the matter. He said there wasn’t anything serious in it at all,  
that Bill Clark had been drunk and boisterous over there the night  
before, and as a joke, some of the boys had prompted him to make  
a speech—that he had made a very inflammatory speech, that the  
boys had carried on the joke by applauding him uproariously and  
by going through the motions of resolving to do all he advised—that  
the whole matter was a joke. We left Culton and went on toward  
the adjutant general’s office. In front of that office we met another  
man whose name I do not remember to whom I repeated what the  
man had told me. He assured me there was nothing in it at  
147 all and I went back satisfied that there was not. This is the  
only thing of the sort I remember to have heard.

33. Previous to the assassination of Senator Goebel, were you ever  
in any meeting with the persons hereinbefore mentioned or other  
persons, where there was proposed or suggested the raising of a row  
in the legislative hall and after the row got up for some men to shoot  
members of the legislature; did you ever have any agreement or un-  
derstanding with W. H. Culton, Caleb Powers or W. S. Taylor or  
other person or persons, that you were to have some member or mem-  
bers of the legislature to raise a row in the legislative hall and after  
the row got up for some men to shoot members of the legislature,  
did you ever entertain such a scheme or such purpose or any scheme  
or purpose of like or similar import?

A. I was never in any meeting with anyone at any time where  
such a suggestion or proposition was made or discussed. I never  
had such an agreement, arrangement or understanding with W. H.  
Culton, Caleb Powers, W. S. Taylor or any other man or men to do  
that or anything like that. No suggestion of that sort was ever  
made by me to anyone else, nor by anyone else to me nor in my  
presence.

34. Was Representative Lilly, or any other person, so far as you  
know or are advised, selected or spoken of to be the men to raise the

row referred to in the foregoing question? State all you know in reference to the matter above inquired about?

148 A. As I said in reply to question No. 33, I know absolutely nothing of any plan, purpose or arrangement in any wise similar or akin to that named and I never heard Mr. Lilly's or any one's else name mentioned in such a connection.

35. Prior to the assassination of Senator Goebel, did you advise his being killed or acquiesce in or consent to any suggestion from any source, of his being killed, did you ever advise the killing of any member of the General Assembly of Kentucky or acquiesce in or consent to any suggestion of the killing of any member of the General Assembly, or the use of any physical force or violence against either Senator Goebel or any member of the General Assembly. Answer in full in respect to the several matters inquired about above.

A. I never at any time advised, acquiesced in or consented to the use of physical force or violence towards, or the killing of, Senator Goebel or any member of the General Assembly.

36. Did you have any conversation with John A. Black at Barbourville, on the 22<sup>nd</sup> day of January, 1900, in reference to bringing the mountain men to Frankfort,—state fully all that occurred between you and said John A. Black; state where your interview with Black was held and who were present; state fully and in detail the entire conversation between you and John A. Black, and state what part Caleb Powers took in said conversation, if any, and in making your response to this question, state as fully as you can what each party said.

149 A. I was not in Barbourville on January 22<sup>nd</sup>, 1900 at all and did not see John A. Black or Caleb Powers at all on that day. I was there and did have a conference with these gentlemen on the evening of January 23<sup>rd</sup>, however. At that conference I said I did not like the arrangements for transporting the men to and from Frankfort and was going to Louisville to make others that would be more satisfactory. I asked John A. Black if I drew a check for seven hundred or eight hundred dollars on his bank to pay for coaches if he would honor it. He said he would. I went to Louisville, made arrangements with the L. & N. railroad for coaches and gave a check in payment therefor which Black did not pay but which was afterward returned to me. I paid the L. & N. a check on another bank. I reached Barbourville about five o'clock in the afternoon of the 23<sup>rd</sup> day of January and did not see and speak to and shake hands with W. P. Reader on the street at any time that day as he testified I did. I never saw him at all till at the depot at about eleven o'clock at night. I went at once from the depot to the Anderson hotel and was not out of the hotel or on the street till I went back to the depot in leaving Barbourville at about eleven p. m.

37. Do you know a man by the name of W. P. Reader, a resident of Barbourville, Kentucky, if so, how long have you known him?

A. I do. I have known him in a way—never intimately, but just as every man in politics knows hundreds of members of his own party—to speak to them in passing, for perhaps ten or twelve  
150 years.

38. On the evening of the 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> of January, or other day or time did you meet said W. P. Reader at the depot in Barboursville just before you boarded the train to go to Frankfort?

A. I did—on the evening of Tuesday, January 23<sup>rd</sup>, 1900.

39. Did you have any conversation with said W. P. Reader upon the occasion referred to above, or at any time wherein said W. P. Reader said to you in form or substance, "Mr. Finley, there is going to be some trouble, ain't there?" (meaning at Frankfort) and you said "It looks mighty like it" and then he said to you "Will they kill Goebel?" and your response was "More than likely, more than probable." He then asked you how long and your response was "Inside of five days;" if you had any conversation with W. P. Reader upon the occasion referred to, state fully the conversation, whether or not you used the language or told him the matters above imputed to you?

A. No such conversation as that ever took place either then or at any other time. On the night of January 23<sup>rd</sup>, 1900 I sat in the waiting room of the Barboursville depot for a few minutes with perhaps eight or ten people waiting for a train. Among them was W. P. Reader—sitting several seats removed and I think, on the other side of the room from me. The name of Senator Goebel was not spoken by either of us. No suggestion was made by him (or thought of by me) that there would be trouble at Frankfort or that

151 Senator Goebel would be killed. The only conversation between us bearing on the contest or matters at Frankfort was a question by him as to how long it would be before the contest then pending before the legislature would be determined. A day or two before that the contest committee had extended the time for hearing evidence before it. With that in mind I replied that it would not be determined for several days yet. That is the sum and substance of our talk on that subject.

40. On the evening of January 24<sup>th</sup>, or on the evening that the mountain men left Barboursville for Frankfort, did you have any interview or conversation at Barboursville between you, Caleb Powers and Wharton Golden, at the Anderson hotel in Barboursville, or elsewhere, in which you or Caleb Powers said "We will go down there" (meaning Frankfort) or "We will take them on down there, and if they do not decide in our favor, we will kill Goebel and the whole damn gang" did you make such statement in form or in substance; did Powers make any response thereto; did Powers in response thereto say, "That is what we will do," if you had any interview or conversation, please state in full all that occurred and what each party said as fully and as explicitly as you can? Did you state you were going to Louisville to look after provisions or food for the men going to Frankfort?

A. I have no recollection of ever having had an interview with Caleb Powers and F. W. Golden at Barboursville. I do not believe I ever did have. I know I had none of any kind at that place on January 24<sup>th</sup>, 1900, for I was not in Barboursville on that day  
 152 at all. On the evening of that day I was in Frankfort. I never uttered such language as is imputed to me in the question to anyone at any time or place, and Caleb Powers never at any time used such, or even similar language as that attributed to him in my presence.

On the contrary, before I separated from Powers on the night of January 23<sup>rd</sup>, 1900, I saw him get a telegram from some one in Frankfort saying that the mass meeting had been called off and to bring no men and heard him say he was sorry he had not gotten the telegram sooner as it was then too late to reach the men—many of whom were already on the way—by wire or mail and stop them.

I did not at any time state that I was going to Louisville to look after provisions or food for the men going to Frankfort, and as a matter of fact did not go for that purpose, but solely to arrange transportation for the men going to Frankfort.

41. Please state whether or not in any interview between you and W. P. Reeder in the town of Barboursville, and upon the occasion already referred to, Wharton Golden was present and state whether or not in the presence of Wharton Golden or at all, in response to a question asked you by Reeder, in effect, whether they would have a fight down there (meaning Frankfort) you said "I think they will" to which Reeder responded by asking you when, and you responded by saying "As soon as we get there;" and also whether or not in that interview Reeder asked you in the presence of Wharton Golden or at all if Goebel will be killed, and you said, "I think he will," please state whether you had any such conversation in  
 153 the presence of Wharton with W. P. Reeder or at all, and state fully in respect thereto.

A. I do not remember that Wharton Golden was ever present at any conversation or interview between me and W. P. Reeder either in Barboursville or elsewhere. I never had a conversation with W. P. Reeder or anyone else in which such or even similar language as that quoted was used. Nothing in form or substance at all like that quoted was ever used by me anywhere or at any time. As before stated I was not in Barboursville at all on January 24<sup>th</sup>, 1900.

42. State whether or not, at your instance, W. H. Culton met the large crowd of men that came to Frankfort on the 25<sup>th</sup> of January, at Richmond, Kentucky, on their way down to Frankfort, and state whether or not you know anything about his going to meet them, and state whether or not you had anything to do with his going to meet them. Did you send any message by said W. H. Culton to Powers in form or substance to keep the men sober and to say if they were asked what they were going down to Frankfort for, they were going to petition the legislature—please state whether you sent

such message and if so for what purpose and by whom the message was sent?

A. Yes; I sent W. H. Culton to Winchester to meet the crowd of men who came to Frankfort on January 25<sup>th</sup>, 1900. I had learned that some of those who were coming would have guns and it occurred to me that it would be best for them to check their guns somewhere and leave them there during the day. I sent him to meet them and ask them to do this and to tell them where to go to do it. I had made arrangements for them to be checked at the agricultural office before Culton left. I told him to impress upon the men and to tell Powers to impress upon them that as they were coming to Frankfort to petition the legislature, they must be sober, quiet and orderly but I did not tell Culton to tell Powers to tell the men to say if asked, that they were going to Frankfort to petition the legislature. I had no thought of sending and did not send such a message as that stated. There was no reason for sending such a message so far as I knew.

43. State whether or not you had any agreement or understanding with Governor W. S. Taylor or W. H. Culton or Caleb Powers or either of them or anyone else during the month of January, to the effect that some members of the legislature were to raise a row in the house of representatives and that when said row was raised, some man or men or anybody were to kill any of the members of the legislature or anybody else? If you had such agreement or understanding, state fully in respect thereto all you know?

A. I never had any such arrangement with them or anybody else either during the month of January or at any other time.

44. Did you at any time, have any knowledge or any agreement or understanding with W. H. Culton or anyone else was to take a crowd of men up in the lobby of the house of representatives armed, and when a row was raised in the legislative hall, that those men or anyone else, were to shoot any of the members of the legislature, Senator Cantrill, Mr. Goebel, South Trimble, or anyone else?

155 A. I never had any such understanding, agreement or arrangement with Culton or anyone else and knew of no such thing.

45. Was there ever such an agreement or understanding as that during the session of the legislature of 1900 at Frankfort Kentucky, between Culton, Taylor, Powers and yourself or anyone else to your knowledge?

A. I never heard of such an agreement or understanding at any time or with anybody.

46. State whether or not on the morning of the 29<sup>th</sup> of January you directed W. H. Culton, or any other person to take Berry Howard or Elija Howard or other person into the lobby of the house of representatives, in order to assist in the seating of Henry Berry?

A. I did not. I did not see Culton on the 29<sup>th</sup> of January at all. I gave no such directions to him or to anyone else either there or at any other time.

47. If W. H. Culton took any men into the house for any such purpose did you direct him, of having anything to do or any connection with such action on the part of said W. H. Culton?

A. If he did so it was without my knowledge. I had nothing to do with it whatever.

48. Did you, on the occasion last above referred to on the morning of the 29<sup>th</sup> of January, seek out W. H. Culton in the lobby of the house of representatives and tell him in form and substance not to press the thing (meaning the seating of Henry Berry) and not to have any trouble that day, and that they, (meaning yourself and other associates without you) had made arrangements to settle the contest without that and not to follow it out any further; and did you further say that General Duke said they had arrangements made to settle the contest without that, and not to follow it out any further; if you had any conversation with Culton upon the occasion referred to, state in full what said conversation was and whether or not you made to him the statements imputed to you as above set forth, and state fully all you know in connection therewith?

A. I left Frankfort at 10:18 on the morning of January 29<sup>th</sup> 1900. That was Monday morning; on Monday the house of representatives did not convene till eleven o'clock. When the house convened I was on the C. & O. train going East. Moreover I was not in the Legislative building on the 29<sup>th</sup> of January at all. I never made any such statement to W. H. Culton on January 29<sup>th</sup>, 1900 at all.

49. Did you have any knowledge or information or suggestion from Basil Duke or from anyone else, or from any source on January 29<sup>th</sup>, 1900 that the contest would be settled by any other means than a contest then pending before the legislature or did you give any such information to Culton at any time?

A. None whatever from him or from anyone else. Nor did I say any such thing to Culton nor give him any such information in any way.

50. How long did you remain in the city of Frankfort after the 29<sup>th</sup> of January; when you left where did you go and with whom did you leave the city of Frankfort and what was the occasion of you leaving Frankfort, state in full your reasons therefor.

A. I left Frankfort January 29<sup>th</sup>, 1900 at 10:18 a. m. I left Frankfort alone and went to Pineville, Kentucky and thence to Louisville.

51. On the morning you left the city of Frankfort did you see Culton or have any conversation with him before leaving?

A. I did not see him that morning at all.

52. Did you deliver at any time to W. H. Culton, or other person, any badges to be worn by the Republican members of the General Assembly, if so, please state what kind of badges you gave him, if any, and what was the purpose of delivering such badges to him, and what was the explanation or instruction given him at the time he received the same from you?



A. I never delivered any badges to him or to anyone else for such a purpose.

53. Did you tell Culton, or other persons with your advise and consent tell him or instruct him to have the Republican members of the legislature to wear badges for their protection and to advise them that they would be killed if they had on one of the badges; please state in full all you know in respect to this matter.

A. I did not. I know nothing of it.

54. Was there any instruction given to Culton or to the members of the legislature or to other persons to be delivered to the members of the legislature, so far as you know, that in the event of trouble in the house, the Republican members were to get on one side of  
158 the house as near as they could, and to get where the men in the lobby could see them and to see that they had badges on ?

A. None that I know or ever heard of.

55. Did you know that said Culton received any instruction from you and do you know of his receiving such instructions from any other person or persons, that he was to take the men armed into the lobby of the house and prepare to seat any man the Republicans wanted seated, and if the Democrats did not seat him, to kill anybody they wanted to, if you have any such instructions or know of other persons giving such instructions, state all you know in respect thereto.

A. Neither Culton nor any one else ever had such instructions nor similar instructions—from me nor from any one else insofar as I know.

56. Did you on the evening of the 24<sup>th</sup> of January, 1900 at Frankfort or any other place, tell W. H. Culton to tell people if anybody asked where the mountain men were going that they were going to petition the legislature,—did you give him any money to go to Winchester on that occasion ?

A. I have no recollection of doing so, to the best of my knowledge and judgment I never told him any such thing. I never told him any such thing. I do not remember to have given him any money to go to Winchester on, though I may have done so; but if  
159 he asked me for money to go on I have not doubt I gave it to him. I wanted some one to go; I regarded the matter as important enough to send some one to meet the train and I probably would have regarded it as important enough to have paid that person's way if he asked me to do so.

57. When did you leave Kentucky, before or after you were indicted for the crime of being an accessory to the murder of William Goebel? Where did you go and when did you leave the State; and state in full what considerations or reasons prompted you in leaving the State; please state fully such considerations and reasons.

A. I left Kentucky on the afternoon of March 6<sup>th</sup> 1900 before I was indicted and before I knew that any warrant had been or would

be issued for my arrest, or was in contemplation. When I came away I fully expected to return to Kentucky in a few days but when I read in a Cincinnati paper of the treatment to which Powers and Davis were subjected when arrested and afterward, I believed that political feeling was running too high for a fair trial for a man charged with a crime which would seem to be a political one. That feeling does not seem to have subsided to such an extent as to give promise of a fair trial even yet. Besides a fund of \$100,000 has been appropriated to prosecute the cases growing out of the murder of Senator Goebel, half of which is offered in sums of five thousand each as rewards for, and contingent upon, convictions. With this amount of money in the case and party feeling as high as it still seems to be I do not think any man, however innocent, could get a fair trial, if charged with complicity in that crime.

58. If you have omitted to state any fact or circumstance, 160 in your judgment, relating to the guilt or innocence of Caleb Powers, please state said omitted fact.

A. I do not recall any such fact.

Cross-interrogatories propounded to CHARLES FINLEY:

1. What is your age, occupation and place of residence.

A. I am thirty eight years old; am a promoter and live in Indianapolis, Indiana.

2. Are all your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information or belief, and what is the source of your information or the foundation of your belief?

A. All answers are made from my own personal knowledge unless the contrary is stated therein.

3. Have you any interest in this action, direct or indirect? If any, what is it?

A. I have no direct interest in the matter but would like to see justice prevail.

4. Have you stated all you know concerning this action? If not, state what you have omitted?

A. I do not remember anything concerning this action which I have not already stated.

CHARLES FINLEY.

STATE OF INDIANA, }  
County of Marion, } ss:

161 I, A. C. Metcalf, a notary public in and for the county and State aforesaid, do certify that the above and foregoing deposition of Charles Finley was taken before me, at my office at room 51 court house in the city of Indianapolis, county of Marion, in the State of Indiana, on the 31<sup>st</sup> day of July, 1903, upon the interrogatories hereto annexed; that said witness was first sworn by me that the evidence he should give in the action should be the

truth, the whole truth and nothing but the truth, before giving his testimony; that the testimony of said witness, was written by me in his presence, read to and subscribed by him in my presence. I further certify that at the taking of said deposition, neither party was present in person nor represented by agent or attorney.

A. C. METCALF,  
Notary Public.

My commission expires on the 14<sup>th</sup> day of March, 1904.

A copy.

Attest:

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFIN, D. C.

STATE OF KENTUCKY, }  
Scott County, } *set*:

I, George S. Robinson, clerk of the Scott circuit court do certify that the foregoing 141 pages of type written matter contain true and exact copies of the record of the Scott circuit court in the case of the Commonwealth of Kentucky against Caleb Powers.

In testimony whereof, witness my hand and seal of said court this 6<sup>th</sup> day of May, 1905.

[SEAL.]

GEO. S. ROBINSON, C. S. C. C.,  
By A. J. COFFIN, D. C.

162-263 On a day following, to-wit:—June 5<sup>th</sup>, 1905, the completed portion of the transcript referred to in the foregoing order of May 8<sup>th</sup>, 1905, was filed herein, same was and is in words and figures following, to-wit:—

Scott Circuit Court, May Term.

MAY 9<sup>th</sup>, 1900.

COMMONWEALTH OF KENTUCKY	}	Indictment for Being Accessory Before the Fact to the Wil-ful Murder of William Goebel.
vs.		
CALEB POWERS.		

Came Thos. B. Ford, clerk of Franklin circuit court and filed in this court the original indictment and papers belonging thereto in the above styled case, also a copy of the orders of said Franklin circuit court which are now filed.

(Warrant of arrest, indictment and pardon heretofore copied.)  
The minutes of the examining court, response of H. H. Kelley and affidavit of B. C. Milam and petition for change of venue were filed as indicated by the foregoing order and are as follows:—

\* \* \* \* \*

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## Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit.  
 CALEB POWERS, Defendant.

The affiants B. C. Milam and Geo. A. Lewis, say that they are residents, tax payers and voters of the county of Franklin, Kentucky, and that they are not of kin to, nor counsel for the defendant Caleb Powers. That they are acquainted with the State of public opinion in said county touching the prosecution pending in this court against said Powers; that they have read his petition filed herein and verily believe the statements of same, for change of venue, are true.

B. C. MILAM.  
 GEORGE A. LEWIS.

Subscribed and sworn to before me by B. C. Milam and Geo. A. Lewis, as clerk for the county court of said county of Franklin this 25<sup>th</sup> day of April, 1900.

N. B. SMITH, C. F. C. C.,  
 By L. C. WALLACE, D. C.

265

## Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Petition for Change of  
 CALEB POWERS, Defendant. } Venue.

Comes the defendant, Caleb Powers, and presents this, his petition, and states that he cannot have a fair trial of this case in Franklin county, and he respectfully asks the court that the venue of this prosecution be changed from this county to some other in the Commonwealth, in which defendant can obtain a fair and impartial trial, and for cause says:

First. That William Goebel who is charged in the indictment to have been killed, was at the time of his death an active and prominent member of the Democratic party of the State. He had been its nominee and candidate for governor in one of the most exciting campaigns that ever occurred in the Commonwealth. That while the home of said Goebel was at Covington, Kentucky, he had for many years before his death been a member of each branch of the State legislature and of the constitutional convention, which bodies assembled and held their session in the city of Frankfort in the said county of Franklin, and said Goebel practically lived in said city a great part of the time during the last ten years of his life.

He says said Goebel was well known there and throughout said county, and at the time of his death had many active, earnest and

influential followers, admirers and political adherents in said city and county.

He says these persons, as he verily believes, will to the fullest extent, exert their influence against this defendant in this prosecution and will resort to all available means to secure his conviction.

This defendant is a non-resident of the county of Franklin, 266 his home being in Barbourville, Knox county in this State, and he has only a temporary residence in Franklin since January, 1900, and has only a limited acquaintance with the people of said county.

He says that since the contest for the office of governor began in December, the adherents of the two political parties have gathered at Frankfort under conditions of very great excitement, and threats of violence have been made by each in the presence and hearing of the citizens of the city and county. Frankfort for months has been an armed camp. Several hundred members of the State guard, supplied with guns and munitions of war, divided in their allegiance between the contending parties, are yet in the city, quartered about the State House buildings and the jail and court house. The passions and prejudices of the people of Franklin county have been and are still so highly inflamed that a fair trial of affiant's case cannot be had here.

He says the honorable judge of this court, on the first day of its present term, in his charge to the grand jury, said to them "You know the horrible situation prevalent in this county better than I can tell you."

Defendant says that he prays for a patient, dispassionate and unprejudiced hearing of his case, and a fair and impartial trial. He believes this can be secured only by a change of venue and prays the court that the same be granted to him, and that all necessary orders be made to that end.

CALEB POWERS.

JOHN YOUNG BROWN,  
JAMES C. SIMS,  
R. C. KINKEAD,

Of Counsel for Defendant.

267 Subscribed and sworn to before me by Caleb Powers this 25 day of April, 1900.

N. B. SMITH, C. F. C. C.,  
By L. C. WALLACE, D. C.

268 Scott Circuit Court, Special Term, July 9", 1900.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

Came the parties to this trial; the plaintiff by attorneys announced that with the understanding that they may have attachments for

absent witnesses, they are ready for trial. Thereupon the defendant by attorney, asked that this cause be continued until to-morrow morning, which is granted.

COMMONWEALTH OF KENTUCKY }  
                                   vs. }  
 CALEB POWERS.

It is ordered that H. Davis Harrod, constable of Franklin county, produce forthwith in this court one Rob't Noaks a prisoner in his charge, to testify in this cause.

COMMONWEALTH OF KENTUCKY }  
                                   vs. }  
 CALEB POWERS.

On motion of the attorney for the Commonwealth, it is ordered that the jailor of Franklin county produce forthwith one, W. H. Culton, for the purpose of testifying on behalf of the Commonwealth in this cause.—

269-280 Scott Circuit Court, Special July Term, July 10".

COMMONWEALTH OF KENTUCKY }  
                                   vs. }  
 CALEB POWERS.

On motion, it is ordered that the names of the attorneys, both for the defense and for the prosecution, appear of record which are as follows, to-wit:

Plaintiff, R. B. Franklin, J. C. B. Seebree, T. C. Campbell, B. G. Williams, Victor F. Bradley, John K. Hendricks, Willard Mitchell;

Defendant:—John Yound Brown, R. E. Roberts, James B. Finnell, R. C. Kinhead, Tinsley & Faulkner, J. E. Sims, L. F. Sinclair, F. B. Sampson, George Denny, W. G. Dunlap, W. C. Owens, Ed Parker.

COMMONWEALTH OF KENTUCKY }  
                                   vs. }  
 CALEB POWERS.

Came the defendant by attorneys and moved the court for continuance and filed his affidavit and statement of attorneys in support thereof; upon which said motion and affidavit the court took time.

The affidavit and statement of counsel referred to in the foregoing order is as follows:—

\* \* \* \* \*



281 Scott Circuit Court, Special July Term, July 11".

COMMONWEALTH OF KENTUCKY }  
 VS.  
 CALEB POWERS. }

The court having considered the motion for continuance made by defendant herein, it is ordered that said motion be overruled, to which ruling of the court the defendant objects and excepts.

Thereupon the defendant filed a general and special demurrer to the indictment, which being heard by the court are over-ruled, to which the defendant excepts.

The defendant then produced the pardon and plea in bar which are ordered filed, and same being considered by the court are over-ruled to which ruling the defendant excepts. Said plea in bar is as follows:—

Scott Circuit Court.

THE COMMONWEALTH OF KENTUCKY }  
 VS.  
 CALEB POWERS. } Plea in Bar.

The defendant Caleb Powers says that on the 11" day of March, 1900, at the city of Frankfort, W. S. Taylor, then and there the defacto, and acting governor of Kentucky, issued to him a pardon, duly attested by the sec't'y of state, and bearing the seal of the Commonwealth of Kentucky, for the alleged offense of which he stands indicted in this case; that the offense mentioned in said pardon of which he was accused, is the same offense mentioned in the indictment herein although said indictment and pardon may not agree in the particular language used in each. He here to the court exhibits said pardon, and asks that same be read in connection with his plea in bar which he now makes. Said pardon is marked "A"

282 and made part hereof, reading in words and figures as follows:

In the name and by the authority of the Commonwealth of Kentucky, W. S. Taylor, governor of said Commonwealth, to all to whom these presents shall come, Greetings:

Whereas a warrant of arrest has been issued in Franklin county, Kentucky on the — day of March, 1900, against Caleb Powers, charging him with the aiding and assisting in the murder of William Goebel and as an accomplice in and accessory to, and conspiring to commit same, and knowing that said charge and warrant is the result of a political conspiracy to terrorize and oppress for political purposes and also believing implicitly in the innocence of said Powers, but realizing as the courts are now organized said Powers will be denied a fair trial.

Now know ye that by virtue of the power vested in me by the constitution, I do by these presents remit the penalty and pardon the offense as therein alleged, and do hereby forever acquit, release and discharge said Caleb Powers as aforesaid from the same enjoining all officers to respect this pardon and govern themselves accordingly.

In testimony whereof I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto fixed. Done at Frankfort the 10 day of March in the year of our Lord one thousand, nine hundred and in the one hundredth and eight year of the Commonwealth.

W. S. TAYLOR.

By the governor:  
[SEAL.]

CALEB POWERS,  
Sec'y of State.

283. Wherefore he asks that the court proceed no further herein : the said indictment be quashed and that he be discharged and go hence without day.

CALEB POWERS,  
By BROWN, OWENS AND OTHERS, Att'ys.

The general and special demurrer referred to in the foregoing orders is as follows :—

284. COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

The defendant demurs specially to that portion of the indictment which charges him with being the accessory before the fact in the killing of William Goebel of some one unknown to the grand jury and which charge is found beginning in the 15<sup>th</sup> line of the body thereof and in these words being, "or another person acting with them but who is to the grand jury unknown," because the same is indefinite and fails to notify the defendant as to the person whose accessory he is charged with being.

JOHN YOUNG BROWN,  
JAMES T. SIMS,  
W. C. OWENS, Etc.,  
Att'ys for Def't.

285. COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

The defendant demurs generally to the indictment herein.

JOHN YOUNG BROWN,  
JAMES T. SIMS,  
W. C. OWENS AND OTHERS,  
For Def't.

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COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Comes the defendant and moves the court that the following witnesses be summoned for the Commonwealth in the above styled case, W. P. McGlore, E. P. Bullock, Mural Gaylor, L. F. Wagoner, John, Perkins, R. C. Blanchford, E. G. Howard, Frank Gross, Will Gross, Richard Gross, A. M. Gibbs, Nolan Powell, James Lewis (of color), Y. M. Higgins, V. W. Newlee, B. A. Rice, Wm. McStewart, Wm. Beard, J. H. Harkleroads, Hiram Cain and Mollie Cain, C. H. Gibson, Abe Herndon, John G. Baker, Green Simpson, Victor Anderson, Frank Woolum, Frank Bunch, J. Lay, Arch Fuller, John M. Finley, R. T. Halvin, Joseph Miller Sr., Wm. Boyd, Mrs. Jan Catron, Effie Parrott, Mat Smith, John Hale, J. T. Blair, C. W. Havelly and in support of said motion defendant filed his affidavit setting forth the facts that said witnesses would testify to facts material to his defense as he believes that they are without means to defray their expenses from their homes to Georgetown, Kentucky, and that they are unable to pay the railway fare to said place, thereupon it is ordered by the court that said witnesses be summoned for the defendant to appear in this court next Tuesday July 17<sup>th</sup>, 1900 and it is further ordered that their per diem and mileage be paid by the Commonwealth.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

This day came the parties and the selection of a jury to try this cause was begun and not having time to complete the selection of the jury, those in the box were given the usual admonition by the court and the usual oath was administered to them as jurors to try this case and placed in the custody of the sheriff who was sworn to keep them together during the adjournment of the court.

Scott Circuit Court, Special July Term, July 12, 1900.

The following is a list of the jurors which was summoned by the sheriff of this county as a special venire from which to select the jury to try the case now on trial, Commonwealth of Kentucky vs. Caleb Powers: W. C. Cook, Alonzo Kemper, Grat Robinson, James Smith, Jr. S. Triplett, Thomas Butler, Ben Oldham, Oscar Nutter, Brack Ireland, G. M. Linville, Thomas Whitton, Richard Bradley, J. T. Henry, Charlie Thompson, B. E. Ford, J. D. Lancaster, W. L. Hook, W. H. Oldham, C. B. Ewing, Q. A. Jameson, J. C. Hambrick, J. W. Samuel, C. T. Settle, Joel Wright, J. D. Graves, J. M. More-

land, A. H. Fry, G. W. Lusby, Hardin Rogers, J. G. Mefford, J. C. Porter, W. A. Franks, George Ware, J. M. Barkley, D. C. Kerr, Beauregard Cannon, Will Carrick and James McKinney, J. C. Zeizing, Postmaster Ramsey, Rom Payne, M. H. Haggard, Clarence Wood, W. L. Ewing, George Murphy, Thomas Hearne, C. B. Pribble, John Wilson, Ras Ware, Ed Gorham, Hub Taylor, A. G. Crumbaugh, J. D. Vance, T. H. Allen, Allen Robinson.

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COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Came again the parties to this trial, the selecting of the jury begun on yesterday, was again resumed and not having time to complete the selection of said jury, those in the box were given the usual admonition by the court and placed in the custody of the sheriff who was sworn to keep them together during the adjournment of the court.

Scott Circuit Court, Special July Term, July 13<sup>th</sup>, 1900.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Came again the parties to this trial. The selection of the jury begun herein on a former day of this term is now completed which jury is as follows:—W. P. Munson, A. W. Craig, W. O. Tinder, W. H. Oldham, George Murphy, I. G. Stone, J. C. Porter, Alonzo Kemper, Ben Ford, J. T. Mulberry, J. P. Crosthwaite, Harris Musselman, who were duly sworn as a jury to try this case and a true verdict render; the hearing of evidence begun, and not having sufficient time to conclude same this evening, after receiving the usual admonition from the court, said jury was placed in charge of the sheriff of this county, who was sworn to keep them together during the adjournment of the court.

\* \* \* \* \*

290-293

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

The following is a list of jurors summoned by the sheriff of this county as a special venire from which to finish the selection of a jury to try this case, Harris Musselman, Will Vanlandingham, G. L. Vanlandingham, John True, Henry Vanlandingham, J. L. Neal, R. L. Marshall, R. H. McCabe, J. H. Jones, Voris Vanlandingham, J. T. Mulberry, E. P. McKinney, Luther Marshall, Jack Greggs, J. P. Crosthwaite, W. W. McCabe, C. J. Garnett, C. H. Hammons, and J. H. Medlin.

Scott Circuit Court, Special July Term, July 14", 1900.

COMMONWEALTH OF KENTUCKY }  
 vs. } Order.  
 CALEB POWERS.

The jury sworn herein on yesterday again appeared in their seats and the further hearing of the evidence resumed and — having sufficient time to conclude same, this evening, said jury after receiving the usual admonition from the court were placed in the charge of the sheriff of this county who was duly sworn to keep them together during the adjournment of the court.

294-300 Scott Circuit Court, July Special Term, Aug. 14", 1900.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

Came again the parties to this trial. The jury heretofore sworn again appeared. The evidence in this case being fully heard, the Commonwealth and defendant both offered instructions in writing, which being considered by the court are refused, to which ruling of the court both the plaintiff and defendant excepted at the time and still excepts.

And thereupon the court of its own motion proceeded to instruct the jury in writing to the giving of which instruction the defendant at the time excepted and still excepts. The jury after receiving the usual admonition from the court were placed in charge of the sheriff who was sworn to keep them together during the adjournment.

The instructions given by the court in the foregoing orders are as follows:—

\* \* \* \* \*

301

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. }  
 CALEB POWERS, Defendant.

The defendant, Caleb Powers, says he has been undergoing trial in the Scott circuit court for over five weeks; that the weather has been excessively hot during that time; that his health from long confinement in jail is seriously impaired; that from time to time since his incarceration in jail it has been necessary that he avail himself of the services of his physician; that he is physically unable to attend night sessions of this court, without danger of permanent

impairment of his health ; that rest at night is absolutely necessary to enable him to retain sufficient strength to go through with this trial. He herewith tenders as part of this affidavit the certificate of a physician showing the condition of his health and he earnestly appeals to the court to grant his request that no night session of the court be held as there is plenty of time during this term of complete this trial holding the regular day sessions.

CALEB POWERS.

Subscribed and sworn to before me by Caleb Powers this 14<sup>th</sup> day of August, 1900.

T. J. PENN, C. S. C. C.,  
By J. T. PENN, D. C.

302

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs.  
CALEB POWERS, Defendant. }

The affiant Jno. A. Lewis, says he is a practicing physician of Scott county, Kentucky ; that he has been in attendance upon defendant professionally from time to time during his confinement in the Scott County jail ; that defendant is a man of frail constitution, suffering at times from dyspepsia, that the confinement in jail and his inability to obtain necessary exercise had weakened him prior to the commencement of this trial ; that during the trial which has now continued for over five weeks the weather has been exceptionally warm and trying on the physical condition of the defendant and he is unable to stand the strain of night sessions of this court without danger of serious injury to his health.

JNO. A. LEWIS, M. D.

Subscribed and sworn to before me by Jno. A. Lewis, M. D. this Aug 14<sup>th</sup>, 1900.

T. J. PENN, C. S. C. C.,  
By J. T. PENN, D. C.

303-313 Scott Circuit Court, Special July Term, Aug. 18<sup>th</sup>, 1900.

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

Came again the parties to this trial. The jury heretofore sworn again appeared to further hear the arguments which being finished to-day, the jury retired and afterward returned into court the following verdict.

"We the jury find the defendant guilty and fix his punishment  
13-393



at confinement in the penitentiary of the State for life. I. G. Stone, foreman."

Whereupon the defendant was remanded to jail to await the sentence of the court.

Scott Circuit Court, Special Term, Aug. 22", 1900.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 and which instructions are also lettered A, B, C, D, E, F, G, H, I, J, K, and L, and which were offered by the defendant and which were refused by the court are now identified and made a part of the record in this case and the defendant's exceptions to the refusal to give said instructions are again noted.

The instructions referred to in the foregoing order are as follows:

\* \* \* \* \*

314 Scott Circuit Court, July Special Term, Aug. 22", 1900.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

Came the defendant and filed motion and grounds for a new trial and affidavits in support thereof to which the Commonwealth objected.

The Commonwealth thereupon asked and was granted time to file counter-affidavits.

Motion and grounds for a new trial and the affidavits referred to are as follows:

315 Scott Circuit Court, Special July Term, 1900.

COMMONWEALTH OF KENTUCKY, Plaintiff, } Motion and Grounds  
vs. } for a New Trial.  
CALEB POWERS, Defendant.

The defendant, Caleb Powers, moves the court to set aside the verdict rendered herein and to grant him a new trial because he says that by the verdict rendered herein his substantial rights have been prejudiced and assigns as grounds in support of such motion the following:

1. That the verdict is against the law.
2. That the verdict is against the evidence.
3. That the verdict is against both the law and the evidence.

4. That the court erred in refusing the instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12, the same being also lettered A, B, C, D, E, F, G, H, I, J, K, & L, and each and all of them asked by the defendant.

5. Because the court erred in giving instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, & 9 as given by the court to the jury, and each and all of them.

6. That the court misinstructed the jury in giving the instructions and each of them as set out in the preceding ground No. 5.

7. Because the court erred in changing, altering and amending over the objection of the defendant instruction No. 7 after four of the five arguments for the defendant had been made before the jury, by adding to said instruction at the end thereof, the following words: "The words, 'some unlawful act' as used in this instruction means some act to alarm, to excite terror or the infliction of bodily harm." The defendant having excepted at the time to such action of the court.

316 8. Because the court erred in admitting incompetent and irrelevant testimony over the objections of the defendant, the defendant having at the time excepted to the rulings of the court.

9. Because the court erred in refusing to admit competent and relevant testimony offered by the defendant, the defendant having at the time excepted to the rulings of the court.

10. Because the court erred in overruling defendant's motion for a continuance herein, the defendant having at the time excepted to the ruling of the court.

11. Because the court erred in overruling the defendant's plea of the pardon granted him by W. S. Taylor as a bar to this prosecution, the defendant having at the time excepted to the ruling of the court.

12. Because the court erred in overruling the motion of defendant after the regular panel of the jury was exhausted to draw the remaining names necessary to complete the jury from the jury wheel, the defendant having at the time excepted to the ruling of the court.

13. Because the court erred in overruling the defendant's demurrer to the indictment herein, the defendant having at the time excepted to the ruling of the court.

14. Because the court erred in overruling the defendant's motion for a peremptory instruction to the jury to find the defendant not guilty at the close of the evidence of the Commonwealth, the defendant having at the time excepted to the ruling of the court.

15. That he was prevented from having a fair trial by reason of the fact that one of the jurymen, to-wit, Harris Musselman who stated upon his examination before being accepted upon the  
317 jury that he had neither formed nor expressed any opinion as to the guilt or innocence of this defendant, had in fact prior to his being accepted as a jurymen herein both formed and expressed the opinion that this defendant and the others indicted with him, were all guilty and ought to be punished, as shown by

the affidavit of John S. Truitt, and James Chipley, hereto attached and made part hereof, and this defendant further says that such information as to such statements or expressions of opinion, or the formation of such opinion by the said Harris Musselman, was not received by this defendant or his attorneys, or any or either of them until after the verdict had been rendered herein, and that by reason of the prejudice and bias of said Musselman to this defendant, it was impossible for him to have rendered, and he did not render a fair or unbiased verdict or give this defendant a fair trial.

16. That he was further prevented from having a fair trial by reason of the fact that Jurymen Munson who served herein and who upon his examination as to his qualifications as a jurymen, before his acceptance as a jurymen, stated that he could give the defendant a fair trial, had in fact, prior to his acceptance as a jurymen, formed and expressed an opinion that this defendant ought to be hung for the crime of killing William Goebel, and that although said Munson had stated upon his examination aforesaid, prior to his acceptance as a jurymen, that he had formed and expressed an opinion but could give the defendant a fair and impartial trial, he was in fact so prejudiced against the defendant that it was impossible for him to give a fair trial to this defendant. This defendant files herewith as part hereof affidavits of Samuel

D. Linville and J. N. Reed as to the statements of said  
318 Munson, and states that the information as to the expression and of the bias of said Munson, was not received by this defendant or by his counsel, or any or either of them, nor was the bias and prejudice of said Munson to this defendant known to this defendant or his counsel or either or any of them, until after the verdict had been rendered herein, and that by reason of the prejudice and bias of said Munson to this defendant, it was impossible for him to have rendered, and he did not render a fair or unbiased verdict, nor give this defendant a fair trial.

17. That he was further prevented from having a fair trial by reason of the fact that another of said jurymen, to-wit, J. T. Mulberry, although the said Mulberry had stated upon his examination as to his qualifications as a jurymen, that he had neither formed nor expressed an opinion as to the guilt or innocence of the defendant, had in fact prior to said examination and prior to his acceptance as a jurymen herein both formed and expressed an opinion that this defendant was guilty and he ought to be hung as shown by the affidavit of one T. Lucas filed herewith and made a part hereof, and that such information as to said Mulberry's opinion and expression of opinion, or of his bias and prejudice, was not received by this defendant or his attorneys or any or either of them until after the verdict had been rendered herein, and that by reason of the prejudice and bias of said Mulberry to this defendant, it was impossible for him to have rendered, and he did not render a fair or unbiased verdict nor give this defendant a fair trial.

18. That he was further prevented from having a fair trial herein

by reason of the fact that another of said jurymen to-wit,  
319 George Murphy, although the said Murphy upon his examination as to his qualifications as a jurymen swore that he had neither formed nor expressed an opinion as to the guilt or innocence of the defendant, had in fact prior to said examination and prior to his acceptance as a jurymen herein, both formed and expressed the opinion frequently that this defendant was guilty and ought to be hung as shown by the affidavit of M. G. Linville and S. D. Linville hereto attached and made part hereon, and that said Murphy was so prejudiced and biased against this defendant that he could not and did not give this defendant a fair and impartial trial; that such information as to the opinion and expression of opinion by said Murphy, and of his bias and prejudice was not received by this defendant and was not known to him or received by him or his attorneys, or any or either of them, until after the verdict had been rendered herein, and that by reason of such prejudice and bias of said Murphy to this defendant, it was impossible for him to have rendered, and he did not render a fair or unbiased verdict nor give this defendant a fair trial.

19. He further states that he was further prevented from having a fair trial herein by reason of the fact that another of said jurymen, to-wit, J. P. Crosswait, as shown by the affidavit of Samuel D. Linville, filed herewith as part hereof, who upon his examination as to his qualifications as a jurymen stated he had neither formed nor expressed an opinion as to the guilt or innocence of this defendant, had in fact prior to his acceptance as a jurymen herein both formed and expressed the opinion that this defendant was guilty, and that he, the said Crosswaite, if he had his way would hang him, as shown by the affidavit of Henry D. Davis and A. R. Roland hereto

320 attached and filed herewith and made part hereof. He further states that said Crosswaite was so prejudiced and biased against this defendant, that he could not and did not give this defendant a fair and impartial trial; that such information as to the opinion and expression of opinion by said Crosswaite and as to his bias and prejudice was not received by this defendant, and was not known to him or received by him or his attorneys or any or either of them, until after the verdict had been rendered herein, and that by reason of the prejudice and boast of said Crosswaite to this defendant, it was impossible for him to have rendered, and he did not render a fair or unbiased verdict nor give this defendant a fair trial.

20. He further states that he was prevented from having a fair trial herein by reason of the fact that another of said jurymen, to-wit, A. W. Craig, who upon his examination as to his qualifications as a jurymen stated that he had neither formed nor expressed an opinion as to the guilt or innocence of this defendant, had in fact prior to said examination and prior to his acceptance as a jurymen herein both formed and expressed the opinion that this defendant was guilty and ought to be hung, as shown by the affidavit of W. W.

Ellington hereto attached and made a part hereof, and further that said A. W. Craig prior to his acceptance as a juryman herein, and after he had been summoned as a juryman herein, stated as shown by the affidavit of Robert Anderson hereto attached, filed herewith, and made a part hereof, that he didn't propose or intend to be controlled or governed in making up his mind or in voting on the verdict herein, by the evidence introduced by either side, but would be controlled entirely by what the court should in-

321 struct the jury, as the court knew more about the matter than he, the said Craig, and that such information as to said Craig's opinion and expression of opinion and purpose was not received by this defendant or his attorneys, or any or either of them until after the verdict had been rendered herein, and that by reason of the bias and prejudice of said Craig, and his said purpose, it was impossible for him to have rendered and he did not render a fair or unbiased verdict nor give this defendant a fair trial.

21. Because the court was guilty of misconduct in the presence of the jury in the following particular; viz., while Witness R. E. Combs called for the Commonwealth was being examined and when the question was raised as to the admissibility of certain evidence offered by the Commonwealth, the court in answer to Gov. Brown of counsel for this defendant, used these words in the presence of the jury; "In other words, according to that statement you claim the right to march up here every day with an armed force and deposit your guns in the jury room and put a guard over those guns and then claim you have the right to do it under the bill of rights, is that your position?" To which Gov. Brown replied, "No, sir, I claim this, that under the bill of rights the citizens of Kentucky have the right to bear arms openly and to peaceably assemble and petition the legislature and their representatives for their rights and to make a statement of their wrongs; and we expect to show that that was done and that on the day it was done by the very policemen of the town of Frankfort, that not an act of violence was committed and that the legislature of Kentucky shut its doors in the face of the committee appointed by the meeting. That is what we expect to show when they were exercising only their constitutional rights.

322 Rights in Kentucky do not belong exclusively to certain people. The mountaineer may be ragged and all that, but he is none the less under the constitution." To which the court replied. "I have set here day after day and have heard that political speech made to the crowd assembled here and in the presence of the jury under the pretext that it was an argument to the court. Now I want to say that there is no law in the bill of rights nor the constitution that I know anything about, or in any other bill, which will permit an assemblage of armed people to come together for any purpose except that designated by law. It is opposed to the law. Even for a military organization unless it is done under the forms prescribed by statute. It is less against the law for an armed assemblage to assemble anywhere for any purpose unless it is done by

virtue of an organization under the military law. The rights claimed for the citizen are the rights of the individual citizen to bear arms openly. That is not a right guaranteed to a mob as they are designated by some of the witnesses who have testified here as to the parties who came down on that train. In addition to that, whether it be a mob or not, they have a right to assemble and petition but they have no right to come and arm themselves and then go to the assembly for the purpose of petitioning or for any other purpose."

To which Gov. Brown counsel for this defendant replied: I think it will appear in evidence before we get through, that the committee which went from this meeting was unarmed, and most all that I have said has been in response to an inquiry from the court. I want that borne in mind. The court has asked me certain questions and I have responded with the same latitude of language with which the court has propounded the question and as to a political speech, I disclaim. I had no notion of doing it."

To which the court further responded: "It was the substance of the same thing you have been saying day after day and the court has taken no notice of it at all. Now, with a good deal of animation you reiterate those statements that you have gone over continuously, and the court is bound to take some cognizance of it."

To which Gov. Brown further responded: "And what the court characterizes as a mob, we expect to show by the Commonwealth's own witnesses, was an assembly of peaceable citizens exercising their rights under the bill of rights."

The court further responding thereto used this language: "Do I understand you to claim that these people in Knox and Whitley and other counties have a right to arm themselves and get aboard of that train as the proof conduces to show, and come upon that train 125 or 180 miles to the capitol of the State and there hold a public meeting, and you claim having gone there under those circumstances, for the purpose as you say of petitioning the legislature, that that is a lawful assembly?"

To which Gov. Brown further responded: "I say that those men had a right to bear arms openly if they desired to do so. I say furthermore that it will be in proof by the Commonwealth's witness, and a part of it is already before the court, that this was a quiet and orderly and peaceful meeting, no arms visible or at least a small degree."

To which the court responded: "The proof all day yesterday and this morning—I don't know what will be the proof you will be able to introduce—but the proof so far conduces to show that there were military companies carried there armed with extra guns with their military uniforms under their citizen's dress, and another company was carried there in citizen's dress. That is the proof so far. They went there armed and they



found a depository for their arms and those arms were checked and placed under guard and those men were kept quartered in the public buildings—now do I understand you to contend that the men who went to the capitol under those circumstances can be held in any state of ease as having gone there for a peaceable purpose?"

To which Gov. Brown responded: "I repeat that so far as that meeting is concerned, and so far as the avowed purpose of their assembling in Frankfort it was absolutely constitutional."

To which the court responded in the following language: "The jury has gotten every scintilla of testimony that has been introduced about that meeting."

To which Gov. Brown responded: "I beg to close this argument because I cannot afford to debate this question with the court, and I want to enter an objection to the remarks of the court as to the character of evidence that has been produced before this jury and to entering an expression of his opinion."

To which the court responded: "And you can enter an exception of the court to the continued reiteration upon the part of senior counsel for the defense injection statements in the presence of the jury to the court, which the court believes is not addressed to the court but to the audience." To all of which remarks of the

325 court made as aforesaid in the presence of the jury, the defendant at the time excepted.

And further while John T. Stamper, a witness for the defendant was testifying, the court in the presence of the jury characterized one of this witness' answers as a stump speech, saying in passing upon the objection of counsel for the Commonwealth: "Yes that is nothing in the world but a stump speech," to which remark and language of the court the defendant at the time excepted.

And further while the defendant was testifying, the court said in the presence of the jury, that: "the witness, (meaning this defendant) 'always prefaced his answers by some sort of explanation, and I have ruled time and time again that if he wants to make an explanation he can explain, but it should come in after he answers the question,' which remark of the court was at the time excepted to be the defendant.

And further while F. Wharton Golden was testifying, the court referring to the newspaper reporter mentioned by Golden in referring to a letter state- in the presence of the jury, "I expect if he had horse whipped the editor it would be what he ought to have had, but I don't think it is relevant," to which remark of the court the defendant at the time excepted in the following words from Gov. Brown his attorney, viz: "And to that we want to except," to which the court replied in the following language, "You can except all you want."

Defendant further says that each and all of the matters hereinbefore set forth were and are prejudicial to the substantial rights of the defendant.

Wherefore defendant prays that this motion be sustained and that he be granted a new trial.

326

CALEB POWERS.

August 22", 1900.

CALEB POWERS,  
By JNO. YOUNG BROWN,  
J. C. SIMS,  
R. C. KINKEAD,  
L. F. SINCLAIR,  
J. B. FINNELL,  
GEO. DENNY,  
W. G. DUNLAP,  
W. C. OWENS,  
JNO. H. TINSLEY,  
H. C. FAULKNER,  
R. D. SAMPSON, Att'ys.

327

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiant John S. Truitt states that he is a resident of Scott county, Kentucky, and of legal age; that he is acquainted with Harris Musselman, who served as a juror in the above styled cause; that prior to the time he was summoned, to appear as a juror in said case to-wit, — day of July, 1900, said Musselman in the presence of this affiant, James Covington and Joe Bradford, said Harris Musselman in speaking of the parties accused of the murder of William Goebel and the accessories thereto, said, meaning the defendant, "that they were all guilty as he believed and ought every G—d d—nd one of them" meaning the defendant "be hung."

JNO. S. TRUITT.

Subscribed and sworn to before me by John S. Truitt, this the 18" day of August, 1900.

LLEWELYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

328

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiant, James Chipley, states that he is a citizen and resident of Scott county, Kentucky, of lawful age; that he is acquainted with

Harris Musseleman, who served as a juror in the above styled cause; that prior to the time said Musseleman was summoned as such juror, to-wit; — day of — 1900, speaking of the parties accused of the murder of William Goebel and the accessories thereto, said in the presence of the affiant "that he thought they had the right men and that they ought to be punished," meaning the defendant herein.

his  
JAMES x CHIPLEY.  
mark.

Witness: T. D. SAMPSON.

Subscribed and sworn to before me by James Chipley, this August 20", 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

329

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiant Samuel D. Linville, states that he is a citizen and resident of Scott county, Kentucky, of legal age; that he is acquainted with S. P. Munson who served as a juror in above styled cause; that prior to the time he was summoned as such juror to-wit: — day of —, 1900, in the presence of the affiant and Grant Shomake said Munson, speaking of the parties accused of the murder of William Goebel and the accessories thereto, said "they ought to hang the whole "push," Taylor and all of them," meaning the defendant herein.

SAMUEL D. LINVILLE,

Subscribed and sworn to before me by Samuel D. Linville 20' August, 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

330

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiant J. N. Reed, says that he is a citizen and resident of Georgetown, Scott county, Kentucky, that he is acquainted with W. P. Munson who served as a juror in the above styled cause; that

prior to the time he was summoned as such juror, the said Munson in the presence of the affiant and affiant's wife, speaking of the parties accused of the murder of William Goebel, and the accessories thereto, said "that he believed all of them were guilty and ought to be hung," meaning the defendant herein.

J. N. REED.

Subscribed and sworn to before me by J. N. Reed this August 21", 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

331

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affiant.  
CALEB POWERS, Defendant.

The affiant T. Lucas, states that he is a resident of Scott county, Kentucky and a citizen thereof, of lawful age; that he is acquainted with J. T. Mulberry, who acted as a juror in the above styled case, that prior to the time said Mulberry was summoned as such juror, to-wit: — day of —, 1900, said Mulberry in speaking of the parties accused of the murder of William Goebel, and the accessories thereto, said in the presence of this affiant, that "he believed that all of them were guilty and they ought to be hung, from Taylor down," meaning the defendant herein.

Subscribed and sworn to before me by T. Lucas, this 18" August, 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

332

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

The affiant, W. G. Linville, says that he is a citizen and resident of Scott county, Kentucky and that on the last days of May or the first days of June 1900 he was in the company of George Murphy, who was one of the trial jury in the above styled case; that in conversation with said Murphy at said time neither reference to the guilt of the defendant Caleb Powers and the others indicted as principals and accessories in the murder of William Goebel that said Murphy said that "he would like to be on the jury to try those fellows (meaning the defendant Powers and the other indicted as above

stated; and that as such jurymen he would be in favor of hanging the last damned son of a bitch of them."

He says that he did not tell or notify in anyway any of the attorneys of the defendant Powers, or the defendant himself of any of the above facts, or of said conversation or of any part of it until after the verdict was rendered against the defendant Caleb Powers, in this trial in the above styled case on the 18<sup>th</sup> of August, 1900—

M. G. LINVILLE.

Subscribed and sworn to by M. G. Linville before me this 18<sup>th</sup> of August, 1900.

JAMES B. FINNELL, JR.,  
Examiner for Scott County, Kentucky.

333

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiant Samuel D. Linville, states that he is a citizen and resident of Scott county, Kentucky of lawful age; that he is acquainted with George Murphy who served as a juror in the above styled cause; that prior to the time he was summoned as such juror, and on frequent occasions in the presence of this affiant, speaking of the parties accused of the murder of William Goebel and the accessories thereto, said Murphy declared "that they were all guilty and ought to all be hung; that there would be that many out of the way this fall," meaning the defendant herein.

SAMUEL D. LINVILLE.

Subscribed and sworn to before me by Samuel D. Linville, August, 20<sup>th</sup>, 1900.

L. F. SINCLAIR,  
Ex. Scott County, Kentucky.

334

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiant Henry D. Davis, says that he is a citizen and resident of Sadieville, Kentucky, Scott county and of legal age; that he is acquainted with J. P. Crosswait, who served as a juror in the above styled cause; that prior to the time said Crosswait was summoned as such juror to-wit: the — day of June, 1900, said Crosswait

speaking of the parties accused of the murder of William Goebel and the accessories thereto, in the presence of this affiant and S. R. Roland, said that "he believed all of them were guilty, and if he had his way he would hang every d—n one of them" meaning the defendant herein.

HENRY D. DAVIS.

Subscribed and sworn to before me by Henry D. Davis, this 18<sup>th</sup> August, 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

335

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit.
vs.	
CALEB POWERS, Defendant.	

The affiant A. R. Roland, states that he is a citizen and resident of Sadieville, Scott county, Kentucky, and of legal age; that he is acquainted with J. P. Crosswait, who served as a juror in the above styled cause; that prior to the time of said Crosswait being summoned as such juror to-wit: — day of June 1900, said Crosswait in speaking of the parties accused as having murdered William Goebel and the accessories thereto, declared in the presence of this affiant and Henry D. Davis that he believed them all guilty and if he had his way he "would hang the last d—n one of them" meaning the defendant herein.

A. R. ROLAND.

Subscribed and sworn to before me by A. R. Roland the 18<sup>th</sup> day of August 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

336

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit.
vs.	
CALEB POWERS, Defendant.	

The affiant W. W. Ellington, states that he is a citizen and resident of Georgetown, Scott county, Kentucky, of lawful age; that he is acquainted with A. W. Craig who served as a juror herein; that prior to the time said Craig was summoned as such juror, to-wit: — day of — 1900 in the presence of this affiant speaking of the parties accused of the murder of William Goebel and the accessories



thereto, said, "that they had the man that killed Goebel, down at the jail, that they were all guilty, and ought to be hung," meaning the defendant herein.

W. W. ELLINGTON.

Subscribed and sworn to before me by W. W. Ellington, this August 20", 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

337

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant, }

The affiant, Robert Anderson, says he is a citizen of Scott county, Kentucky, and was one of those summoned as a jurymen herein; that during the time the jury was being impaneled herein he was in the ante-room with A. W. Craig discussing the probability of being accepted as jurymen and that during such discussion and before said Craig had been called into the court room for examination as to his qualifications he the said Craig said to this affiant that he, the said Craig had never formed any opinion as to the guilt or innocence of the defendant Caleb Powers; that he had never served as a jurymen but if accepted as a juror herein he did not propose or intend to be controlled or governed in making up his mind or in voting on the verdict by the evidence introduced by either side but would be controlled entirely by what the court should instruct the jury as he, (referring to the court) knew more about the matter than he, the said Craig, and that shortly after said conversation said Craig was accepted as a jurymen herein and served as such.

ROBERT H. ANDERSON.

Subscribed and sworn to before me by Robert Anderson this 20" day of August, 1900.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Ky.

338 Scott Circuit Court, July Special Term, Aug. 23", 1900.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS. }

Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 respectively and which instructions were also lettered A. B. C. D. E. F. G. H. I. J. K and L respectively and which were asked by the defendant at

the conclusion of the testimony herein and before the giving of the instructions by the court, on his own motion as shown by order made and entered of record herein on the 32nd day of this special term of court, to-wit, Aug. 14", 1900, and which instructions numbered and lettered as above indicated, were refused by the court, are now identified and made a part of the record in this case and the defendant's exceptions then made to the refusal of the court to give said instructions are again noted.

SAME }  
vs. }  
SAME. }

Affidavit of defendant filed.

The affidavit referred to in the foregoing order is as follows :—

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS.

} Affidavit on Motion for New Trial.

The affiant Caleb Powers says that he had no knowledge or information nor had his attorneys or any of them of the facts set out in the affidavits of John B. Truitt and James F. Chipley, Sam. D. Linville, J. N. Reed, T. Lucas, M. T. Linville, Sam. D. Linville, Henry D. Davis, A. R. Roland, W. W. Ellington and Bobt. H. Anderson until after the trial and verdict herein.

CALEB POWERS.

Subscribed and sworn to by Caleb Powers before me this 23" August, 1900.

JAMES B. FINNELL,  
Examiner for Scott County, Kentucky.

340

COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS.

Came the attorney for the Commonwealth and filed the affidavits of A. W. Craig, W. H. Murphy, Geo. W. Murphy, J. W. Briscoe, J. W. Thomasson, I. G. Stone, W. P. Munson, J. B. Crosswaite, Jas. Covington, and Joe Bradford, Harris Musselman, J. T. Mulberry, H. T. Price, J. F. Ford, to which the defendant objected.

The court having completed the motion and grounds for a new trial, over-ruled same, to which ruling of the court the defendant excepts and prays an appeal to the court of appeals, which is granted.

The several affidavits referred to in the foregoing order are copied with the bill of exceptions filed Sept. 5", 1900.

Scott Circuit Court, July Special Term, Sept. 5", 1900.

COMMONWEALTH OF KENTUCKY

vs.

CALEB POWERS.

} Judgment.

The defendant, Caleb Powers, was this day brought into court and being informed of the nature of the indictment, plea and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him, and none being shown it is adjudged that the defendant be taken by the sheriff of Scott county to the State penitentiary at Frankfort, Kentucky and there confined at hard labor for the period of his natural life.

To all of which judgment the defendant excepts and prays an  
 341 appeal to the court of appeals of Kentucky, which is granted  
 and the execution of the foregoing judgment is now suspended  
 for sixty days in order to give the defendant time to file the  
 record herein and his appeal in the court of appeals. Thereupon  
 came the defendant and produced and had filed his bill of exceptions  
 herein which bill of exceptions was examined, approved and allowed  
 by the court and signed by the judge thereof and ordered by the  
 court to be made part of the record herein but not to be spread at  
 large upon the order book.

The bill of exceptions referred to in the foregoing order is as follows:—

342-345 Thereupon the Commonwealth offered the following instructions and moved the court to give them to the jury, which motion was overruled, to which the Commonwealth excepted. The instructions are as follows, viz:—

\* \* \* \* \*

346 The defendant presented to the court the following instructions numbered 1-2-3-4-5-6-7-8-9-10-11-& 12 respectively, and which instructions are also lettered A-B-C-D-E-F-G-H-I-J-K & L respectively and moved the court that they be given to the jury, which motion was overruled by the court, and each and all of the instructions of the defendant indicated above were refused by the court and none of said instructions were given, to

347-349 which ruling of the court the defendant at the time excepted and still excepts. The instructions asked by the defendant are as follows:—viz:

\* \* \* \* \*

350-355 The court thereupon of its own motion gave to the jury the following instructions, to the giving of which instructions and to each and all of them the defendant at the time objected and excepted and still excepts. The instructions given by the court are as follows:—

\* \* \* \* \*

356 The foregoing were all the instructions asked, given or refused.

357 After the conclusion of the arguments for the Commonwealth, and for the defendant, the jury rendered the following verdict:

"We the jury find the defendant guilty and fix his punishment in the penitentiary of the State for life.

I. G. STONE."

Thereupon the defendant filed his grounds and the affidavits annexed thereto of Samuel D. Linville, J. N. Reed, T. Lucas, M. G. Linville, Henry D. Davis, A. R. Roland, W. W. Ellington, and Robert H. Anderson and moved the court to set aside the verdict and grant him a new trial, and the Commonwealth filed the counter affidavits of A. W. Craig, W. H. Murphy, George W. Murphy, J. W. Thomasson, I. G. Stone, W. P. Munson, J. C. Crosswait, Jas. Covington, Joe Bradford, Harris Musselman, J. T. Mulberry, H. T. Price and J. F. Ford, which motion for a new trial was overruled by the court, to which ruling of the court the defendant at the time excepted and still excepts.

The counter affidavits above referred to are as follows:

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit of A. W. Craig.
vs. CALEB POWERS, Defendant.	

Affiant A. W. Craig, says that he is acquainted with W. W. Ellington; that he has read affidavit of said Ellington made before Llewellyn F. Sinclair as examiner of Scott county, Kentucky. This affiant further says that "prior to the time this affiant was summoned as a juror in the above styled cause, to-wit, on the — day of — 1900, in the presence of said W. W. Ellington nor at any other time or place nor in any other presence did he this affiant ever  
358 say that 'they have the man that killed Goebel down at the jail, that they were all guilty, and ought to be hung.'" This affiant says that he never did in either form or substance nor in words that could be distorted into any such meaning say to said Ellington or to any one else,—meaning this defendant or any other defendant or other man,—any such statement. And this affiant further says that the said statement in said Ellington's affidavit is untrue.

This affiant further says:—That never, either in the ante-room with Robert Anderson discussing the probability of being accepted as a juryman and that during such discussion and before this affiant had been called into the court room for examination as to his qualifications nor at any other time or place nor in any other pres-

ence did he say, "If accepted as a juror herein I do not propose or intend to be controlled or governed in making up my mind or in voting on the verdict by the evidence introduced by either side, but would be controlled by what the court should instruct the jury as to (referring to the court) knew more about the matter than I." This affiant says that he has never at any time in form and substance said anything that could possible be distorted into such meaning and this affiant says that all statements to the contrary in the affidavit of Robert Anderson are untrue. This affiant further says that he went upon that jury in this case with a full knowledge that the evidence must be considered by the jury in order to give the defendant a fair trial; that his verdict was made upon the facts in evidence and the law as given by the courts. That as a juror he took an oath to give defendant a fair and impartial trial and that he did so uninfluenced in any manner by any matter or thing

359 save the evidence the law and argument of counsel as presented, in open court.

A. W. Craig says the foregoing statements are true.

A. W. CRAIG.

Subscribed and sworn to before me by A. W. Craig this August 22", 1900.

J. T. PENN, C. S. C. C.,  
By J. T. PENN, D. C.

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit of W. H. Murphy.
vs.	
CALEB POWERS, Defendant.	

Affiant, W. H. Murphy, says that he is a citizen and resident of Scott county, Kentucky, and that he known George W. Murphy who served as a juror in the trial of this cause and he says that about two months before the trial of this case began, he heard said Murphy say that if he should happed to be chosen as juror on the trial of any of the parties charged with the assassination of William Goebel or with being accessory thereto, that he could give them a perfectly fair and impartial trial, free from prejudice. He says that he is in no way related to said Geo. W. Murphy by blood or marriage.

W. H. MURPHY.

Sworn to before me by W. H. Murphy this 23" day of Aug. 1900.

VICTOR F. BRADLEY,  
Examiner of Scott County.





## Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit of J. W. Briscoe.  
 CALEB POWERS, Defendant. }

This affiant J. W. Briscoe says that he was present in the ante-room in the court house in Georgetown, Kentucky, with Robert H. Anderson, A. W. Craig, J. W. Thomasson and I. G. Stone, during the time the jury was being impannelled herein, that there was no other person present in said room than those named. The matter of the probability of being accepted as jurymen was freely discussed openly, by all present in a general way and A. W. Craig did not then  
 362 and before he was called into the court room for examination as to his qualifications say, in said room or any where else in the presence or hearing of this affiant that "if accepted as a juror herein he did not propose to be controlled or governed in making up his mind or in voting on the verdict by evidence introduced by either side but would be controlled entirely by what the court should instruct the jury as he (referring to the court) knew more about the matter than he (the said Craig)." This affiant further says that no such matter as is above stated was said in said room either by said Craig or by anyone else present and nothing was said by anyone then and there present that could be distorted into any such statement.

J. W. BRISCOE.

Subscribed and sworn to before me this 23<sup>rd</sup> day of August, 1900.

J. R. DOWNING,

Notary Public, Scott County, Kentucky.

My commission expires Jan. 31<sup>st</sup>, 1902.

## Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }  
 vs. } Affidavit of J. W. Thomasson.  
 CALEB POWERS. }

This affiant J. W. Thomasson says that he was present in the ante-room in the court house in Georgetown, Kentucky, with Robert H. Anderson, A. W. Craig, and others during the time the jury was being impannelled herein, present in said room beside this affiant Anderson and Craig, were J. W. Briscoe and I. G. Stone and no others. The matter of the probability of being accepted as jurymen was freely discussed openly by all present in a general way, and A. W. Craig did not then and before he was called into court room for examination as to his qualifications say in his (this affiant's)

363 presence and hearing that he (said Craig) "if accepted as a juror herein he did not propose to be controlled or governed in making up his mind or in voting on the verdict by evidence introduced on either side but would be controlled entirely by what the court should instruct the jury as he (referring to court) knew more about the matter than he, the said Craig."

This affiant further says that he heard said Craig say nothing that could possibly have been distorted into such a statement as is above quoted. This affiant further says that on Monday, August 20<sup>th</sup>, 1900, Robert H. Anderson who has filed an affidavit herein, came to this affiant and said in substance, "Jim, don't you recollect that Ab Craig said in that room that he would be governed by the judge's instructions and not by the evidence introduced by either side." I told him I had no recollection of any such statement. He then said "They are trying to get me or want me to make an affidavit that Ab did say so but I don't know that I'll do it." This conversation occurred along in the afternoon of August 20<sup>th</sup> (Monday) 1900.

J. W. THOMASON.

Subscribed and sworn to before me this August — 1900 and interlined before signed or sworn to.

J. R. DOWNING,  
Notary Public, Scott County, Kentucky.

My commission expires Jan. 31<sup>st</sup>, 1900.

364 Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	}	Affidavit of I. G. Stone.
vs.		
CALEB POWERS, Defendant.		

Affiant I. G. Stone, says that he was present in the ante-room in the court house in Georgetown, Kentucky, with Robert H. Anderson, A. W. Craig, J. W. Thomason and J. W. Briscoe during the time the jury in this case was being impanelled, that there was no other person present in said room than those named; the matter of the probability of being accepted as jurymen was fully discussed, openly, by all present in a general way and A. W. Craig did not then and before he was called into the court-room for examination as to his qualification say, in said room or anywhere else, in the presence or hearing of this affiant that "If accepted as a juror herein he did not propose to be controlled or governed in making up his mind or in voting on the verdict by evidence introduced by either side but would be controlled entirely by what the court should instruct the jury as he (referring to the court) knew more about the matter than he, the said Craig." This affiant further says that no such matter as above stated was said in said room either by said Craig or

by any one else present and nothing was said by one there and then present that could be distorted into any such statement.

I. G. STONE.

Subscribed and sworn to before me this 23<sup>rd</sup> day of August 1900.

VICTOR F. BRADLEY,

Examiner of Scott County.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS. }

Affidavit of W. P. Munson.

This affiant says that he has read the affidavit of Samuel D. Linville on file herein that the S. P. Munson named in said affidavit is not this affiant but this affiant's brother; that the statement that S. P. Munson served on the jury in this case is false, and whatever S. P. Munson might have said could in no way affect this affiant's qualifications as a juror; that this affiant never in the presence of said Samuel D. Linville and Grant Soumake nor in any other presence anywhere speaking of the parties accused of the murder of William Goebel and the accessories thereto said "they ought to hang the whole "push" Taylor and all of them, meaning the defendant herein. This affiant further says if the statements in said Linville's affidavit were intended to apply to him they are false in toto.

This affiant further says that he has read the affidavit of J. N. Reed on file herein and that prior to the time he was summoned herein as a juror he might have said in the presence of J. N. Reed and his wife speaking of the parties accused of the murder of William Goebel and the accessories thereto that "if they are guilty of the charges they ought to be hung," but this affiant says that he did not say in the presence of J. N. Reed and his wife that he believed "all of them were guilty and ought to be hung," meaning this defendant herein.

This affiant further says that he had not knowledge nor information sufficient upon which to found a belief as to the guilt or innocence of this or any of the other parties charged with the murder of William Goebel or accessory thereto, this affiant says that he was of opinion that the assassination of William Goebel was a wicked and cruel murder but as to who did it or who was responsible for it he had no opinion until after he had heard the evidence, the law and the argument of counsel in the open court upon the trial. Affiant further says that he was in no measure influenced in his verdict by any matter or thing save the evidence the law and argument of counsel, that he, as a juror, gave defendant Caleb Powers a fair and impartial trial and the verdict of the jury was a true expression of his opinion and judgment under his oath as a juror.

Affiant further says that on the morning of the day he was selected as a juror herein the aforesaid J. N. Reed was present in the court room with or near defendant Powers and his attorneys and it seems strange to this affiant that, the said Reed, did not then make known to said defendant or his attorneys the information as to this affiant he, said Reed, in his affidavit pretends to have had.

W. P. MUNSON.

Subscribed and sworn to before me by W. P. Munson this 23<sup>rd</sup> day of August, 1900.

VICTOR F. BRADLEY,  
Examiner of Scott County.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS.

} Affidavit of J. P. Crosthwait.

This affiant J. P. Crosthwait says that until the motion and grounds for a new trial herein were shown him on this day he had never heard of Samuel D. Linville and although the signed motion of defendant Caleb Powers says "J. P. Crosthwait, as shown by the affidavit of Samuel D. Linville, filed herewith as part hereof had in fact prior to his acceptance as a jurymen herein both formed and expressed the opinion that this defendant was guilty and that he, the said Crosthwait, if he had his way would hang him," there is no such affidavit of Samuel D. Linville on file in this case as part of said motion for a new trial herein.

This affiant further says: The statement in the affidavit of Henry D. Davis on file herein that "prior to the time said Crosthwait was summoned as such juror to-wit: — day of June, 1900, said Crosthwait speaking of the parties accused of the murder of William Goebel and the accessors thereto, in the presence of this affiant and A. R. Roland, said that "he believed all of them were guilty and if he had his way he would hang every d—n one of them," meaning the defendant herein," is absolutely false.

This affiant says that never at any time, anywhere in any presence has he said any such thing or any thing that could possibly be distorted into any such meaning. This affiant says that Henry D. Davis has informed this affiant that he came from Caleb Powers' neighborhood in the mountains, that he and Powers were particular friends.

368 This affiant further says that the statement in the affidavit of A. R. Roland on file herein that "prior to the time of said Crosswaite being summoned as such juror to-wit: — day of June, 1900, said Crosswaite in speaking of the parties accused as having murdered William Goebel and the accessories thereto declared in

the presence of this affiant and Henry D. Davis that he believed them all guilty and if he had his way he would hang the last one of them "meaning the defendant herein," is absolutely false.

This affiant says that never at any time in any place in any presence has he declared or said any such thing or anything that could possibly be distorted into any such meaning.

This affiant says that he did consider the assassination of William Goebel a cruel and wicked murder and may have said that whoever did it ought to be hung but he had no opinion as to the guilt or innocence of either this defendant or any other accused as principal or accessory to the crime; that under his oath as a juror he gave the defendant Powers a fair and impartial trial uninfluenced in any measure by any matter or thing other than the evidence, the law and argument of counsel as presented in open court upon the trial and that the verdict of the jury was the expression of his fair and honest opinion and judgment as to this defendant's guilt after he had given him a fair and impartial trial under his oath as a juror.

J. P. CROSTHWAIT.

Subscribed and sworn to before me by J. P. Crosthwait this August 23<sup>rd</sup>, 1900.

VICTOR F. BRADLEY,  
Examiner of Scott County.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY

VS.

CALEB POWERS.

} Affidavit of Jos. Covington.

The affiant James Covington says he knows John S. Truitt and he says that he was present and heard the conversation between the said Truitt and Harris Musselman on the — day of July, 1900. He says that Joe Bradford was present at said time and he further says that said Musselman did not say at said time or place that they were all guilty as he believed and ought every G—d d—nd one of them be hung. He said said Musselman never said anything that could be so construed at that time or at any time in his presence.

J. J. COVINGTON.

Sworn to before me by James Covington the 23<sup>rd</sup> day of August, 1900.

VICTOR F. BRADLEY, Examiner.

## Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }  
 vs. } Affidavit of Joe Bradford.  
 CALEB POWERS.

The affiant Joe Bradford says that he was present at the conversation between John S. Truitt and Harris Mussleman on — day of July, 1900, and he says he heard said conversation and that the said Mussleman did not say at that time and place "that they were all guilty as he believed and ought every G—d d—nd one of them be hung." He says that Mussleman did say in substance that whoever did it ought to be punished or ought to be hanged and  
 370 that Mussleman said the above after the said Truitt had said "Jack Chiun or some of Sanford's friends had killed William Goebel" and that the defendant Powers was not spoken of in said conversation.

his  
 JOE x BRADFORD.  
 mark.

Witness: J. W. WHITTON.

Sworn to before me by Joe Bradford this 23<sup>rd</sup> day of Aug. 1900.  
 VICTOR F. BRADLEY, Examiner.

## Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit of Harris  
 CALEB POWERS, Defendant. } Mussleman.

This affiant Harris Musselman, says:—I have read the affidavit of John S. Truitt made before one Llewellyn F. Sinclair an examiner for Scott county on August 18<sup>th</sup>, 1900, on file in above styled cause, and I desire on oath to say that prior to the time I was summoned to appear as a juror in said case, to-wit:—

— day of July, 1900, neither in the presence of said Truitt, James Covington and Joe Bradford nor in the presence of any other person or persons, in speaking of the parties accused of the murder of William Goebel and the accessories thereto did I say, meaning the defendant, "that they were all guilty as I believed and ought every G—d d—nd one of them" meaning the defendant "be hung." I desire to say further that the substance of the conversation had with Truitt was, Truitt said that Jack Chiun had killed Goebel and I  
 371 might have said that whoever did it "ought to be punished" or to be hanged. But I did not say that they were all guilty (meaning this defendant) as I believed and ought every G—d d—nd one of them (meaning this defendant) "be hung."



I have also read affidavit of James Chipley and desire to say that I did not say to him nor in his presence prior to the time I was summoned as a juror nor at any time when speaking of the parties accused of the murder of William Goebel and the accessories thereto, "that I thought they had the right men and they ought to be punished," meaning the defendant here.

I desire further to say that I had no knowledge upon which to found a belief as to the guilt or innocence of any one charged. My only opinion was that whoever was guilty of the assassination of William Goebel ought to be punished but as to who the guilty party or parties were I had no opinion until after being sworn as a juror. I had heard the evidence the law and argument of counsel then my opinion as to Caleb Powers was expressed in the verdict of the jury uninfluenced by any matter or thing other than the facts, the law and argument as presented in open court upon the trial and that verdict was the fair, impartial and just expression of my opinion and judgment under my oath as a juror, and any statements by any one to the contrary are untrue.

HARRIS MUSSELMAN.

Subscribed and sworn to before me by Harris Musselman this August 22", 1900.

J. R. DOWNING,  
Notary Public, Scott County, Kentucky.

My commission expires January 31", 1902.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY

VS.

CALEB POWERS.

} Affidavit of J. T. Mulberry.

This affiant J. T. Mulberry says:—He is acquainted with T. Lucas who has filed an affidavit herein, that this affiant has read said affidavit and now says and swears that never at any time or place did he say to or in the presence of said Lucas in speaking of the parties accused of the murder of William Goebel and the accessories thereto that "he (this affiant) believed that all of them were guilty and they ought to be hung from Taylor down" meaning the defendant herein. Now has this affiant at any time or place in any presence said such words meaning this defendant or any one else charged with the crime or as being accessory thereto.

This affiant says that he, under his oath as a juror, gave defendant Powers a fair and impartial trial uninfluenced in any measure by any matter or thing other than the evidence, the law and the argument of counsel as presented in open court upon the trial.

J. T. MULBERRY.

Subscribed and sworn to before me this August 23<sup>rd</sup>, 1900.

VICTOR F. BRADLEY,  
Examiner of Scott County, Kentucky.

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit of H. T. Price and J. F. Ford.
vs. CALEB POWERS, Defendant.	

373 Affiant- Henry Price and John F. Ford state that after A. W. Craig had been summoned on the regular panel of jurors and before he had be- selected as a juror or examined as to his qualifications to try this case, that they were setting with him at the store of Ford & Craig and in conversation something was said about the trial of this case, immediately said Craig stated that he and the other jurors had been admonished by the court not to talk to anyone about the case and if we were going to talk about the case he would leave and he immediately got up and left. We did not know at that time said Craig had been so admonished by the court.

JOHN F. FORD.  
H. T. PRICE.

Sworn to before me by A. W. Craig and J. F. Ford this 23<sup>rd</sup> of Aug. 1900.

VICTOR F. BRADLEY, Examiner.

The grounds for a new trial are as follows, and the affidavits annexed thereto and above referred to are as follows :

374 Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit of — — .
vs. CALEB POWERS, Defendant.	

Affiant, Thomas Sallee says he is a citizen and resident of Scott county, Kentucky, and that he is acquainted with Geo. W. Murphy who served as a juror in the trial of this case. He says that after said Murphy had been summoned as a juror herein but before he had been accepted as a juror, he heard said Murphy say that if he should be taken as a juror on the trial of this case he could give the defendant a perfectly fair and impartial trial, free from all prejudice.

THOMAS SALLEE.

Sworn to before me by Thomas Sallee this 23<sup>rd</sup> day of August, 1900.

VICTOR F. BRADLEY,  
Examiner of Scott County.

375 Scott Circuit Court, October Term, Oct. 7", 1901.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

Comes the attorney for the Commonwealth, the defendant appeared. On motion of the attorney for the Commonwealth the mandate of the court of appeals of Kentucky reversing the judgment of this court, rendered in this cause on Sept. 5", 1900 and awarding this defendant a new trial and directing further proceedings consistent with the opinion of the court of appeals, which said mandate was filed in the clerk's office of this court, on the 23" day of July, 1901, is now noted of record as filed.

The attorney for the Commonwealth also filed herein separate notices, one executed on Caleb Powers in Franklin county by the sheriff of said county, on Sept. 16", 1901, reciting the filing of the mandate of the court of appeals in the clerk's office of this court on July 23", 1901, and that it was the purpose of the Commonwealth's attorney to ask a trial of the indictment against the defendant at this term of this court, and one of same substance and import executed upon J. B. Finnell and L. F. Sinclair, of counsel for this defendant, executed by the sheriff of Scott county on Sept. 16", 1901.

Whereupon the counsel for the defense stated in open court that they had no objections to the foregoing order provided there was added to it the additional order that the judgment of conviction heretofore entered be set aside and the defendant granted a new trial, and the court upon its own motion thereupon extended said foregoing order by adding thereto the following, to-wit:—

376 "And the mandate of the court of appeals is ordered to be spread on the order book and the judgment of conviction heretofore entered in this court is set aside and held for naught."

The mandate of the court of appeals herein is as follows, to-wit:

"THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

MARCH 28", 1901.

CALEB POWERS, Appellant, }  
 vs. } Appeal from a Judgment of the Scott  
 COMMONWEALTH, Appellee. } Circuit Court.

The court being sufficiently advised, it seems to them that judgment herein is erroneous; it is therefore considered that said judgment be reversed and the cause remanded with directions to award

appellant a new trial and for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

A copy.

Attest:

S. J. SHACKELFORD, C. C. A.,  
By S. D. HINES, D. C.

Issued July 23'', 1901."

OCTOBER 7'', 1901.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

This day came the defendant by his attorney and filed his affidavit and the affidavit of J. N. Reed.

The affidavits referred to in the foregoing orders — as follows :—

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Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The defendant, Caleb Powers, states that he is the defendant herein, and that the Honorable James E. Cantrill, judge of this court, will not afford him a fair and impartial trial, and he bases this affidavit upon the following facts :—

He states that the judge of this court is a man of intense political feeling and was on the most intimate terms of friendship with Senator William Goebel of whose murder this affiant is accused by the indictment herein, that the said judge of this court was and is a Democrat, and was in close sympathy with the said Goebel in the contest that was pending between said Goebel and W. S. Taylor for the office of governor of the State of Kentucky at the time said Goebel was shot ; that this affiant is and has always been, a Republican in politics, and that the death of said Goebel occurred during the existence of intense political excitement and feeling then prevailing in the State of Kentucky ; and particularly at Frankfort, and that the said judge of this court has, by reason of said friendship for said Goebel, and by reason of the political conditions then and now existing, conceived, and now entertains, against this affiant a feeling of hostility and prejudice ; that during the whole of the previous trial of this case, although this defendant was daily in the presence of said Cantrill and although he met him frequently in the hallway and in the court room, the said Cantrill never recognized or greeted this affiant but always manifested toward him a feeling of hostility and contempt.

378 He furthermore states that when the original list of names drawn for jury service upon the former trial had been exhausted, the said Cantrill, although requested by counsel for this affiant, refused to draw any names of jurymen from the jury wheel but directed the sheriff to summon one hundred men for jury service upon said trial and explicitly directed said sheriff of Scott county to summon no man for such jury service from the city of Georgetown, but to go out in the county for that purpose, and upon the following morning when the one hundred men so summoned, had appeared in court, they were seated on one side of the court room separate and apart from the spectators and other persons and that said Cantrill without notice to the defendant or any one of his counsel, and without making any request of any of his counsel or of this defendant to accompany him, went to the side of the court room wherein said parties summoned for jury service were assembled, and without swearing said parties, so far as this affiant saw, heard or has information, as to their excuses for not serving, if any they had, called them up to him one at a time, not in the hearing of the defendant or his counsel, and excused such of them from jury service as he saw fit, without any knowledge on the part of this defendant or his counsel, as to why such parties were thus excused and on the following day the same proceeding was had as to the forty additional men that had been summoned for jury service in this case.

Affiant further says that during the progress of said trial, the said judge of this court a number of times engaged in heated and angry controversy with counsel for the defendant showed in his manner and words an intense prejudice against this affiant and his counsel

and at one time characterized the argument of counsel for  
379 defense upon questions of evidence arising upon the trial as a stump speech and alluded to the men who went to Frankfort on January 25", 1900, as a mob, all of which was said and done in the presence and hearing of the jury and for the purpose of influencing the jury against this affiant.

The affiant further states that during the final argument of W. C. Owens, one of the counsel for this affiant, the hour of adjournment, to-wit: 9 o'clock p. m. having arrived, the said judge, without speaking to said Owens, who was then engaged in his argument, called to the sheriff of the court to come around and be sworn to take charge of the jury; that thereupon said Owens, realizing that the court was about to adjourn, turned and rema-ked to the said judge that he could finish his argument in two or three minutes and requested to be allowed to do so, but that said judge, ignoring the request of said Owens to be allowed to close his argument, immediately adjourned the court without remark to said Owens and without allowing him to complete the argument which was nearly finished.

Affiant further states that near the close of the argument of R. B. Franklin, the Commonwealth's attorney in said case, the said Cantrill made to said Franklin a written suggestion in reference to his argument and further allowed said Franklin to consume more time

in his argument than had been allotted him and this over the objection of this affiant's counsel.

Affiant further says that during the progress of the said trial, the audience in the court room, at the close of the argument of one of counsel for this affiant, started to applaud, when the said judge immediately checked said applause as it was proper he should have  
380      done, and threatened to fine any one guilty of a repetition of said offense, and to clear the court room of spectators if such offense was repeated, but that afterwards, at the close of the argument of R. B. Franklin, Commonwealth's attorney, the audience repeated said offense and that said applause was not checked by the court or the audience admonished or punished.

Affiant further says that the day after said Cantrill fined W. C. Owens, of counsel for defense, \$10.00, an article appeared in the Louisville Courier-Journal which referred to the angry and excited manner in which the court had acted when said fine had been imposed, and that when said newspaper was seen by said Cantrill he called John D. Wakefield, the reporter of the Courier Journal, to him on the bench during open court and privately rebuked him for having sent an account of this proceeding to said paper and severely admonished him against a repetition of such publications, stating to said Wakefield that he (Wakefield) ought to know that the appearance of such articles in the Courier Journal would hurt the Democratic party in the State of Kentucky.

The affiant further says that during the progress of the former trial the said judge manifested in many ways and in an open and public manner his favoritism to the prosecution by interposition on behalf of material witnesses for the Commonwealth during their cross examination and also manifested his hostility to the defendant by his manner and bearing toward this defendant while he was testifying as a witness and by angry and unjust criticisms in the presence of the jury of the way the defendant was testifying; and this affiant states that such manner and actions on the part of the court were intended to and did, influence the jury prejudicially to this affiant.

The affiant further states that the judge of this court is now a  
381      candidate for the United States Senate, and is actively engaged in prosecuting his candidacy, seeking election at the hands of the supporters and political adherents of the late William Goebel, and that, in a speech made in Maysville, Kentucky, on September 23<sup>rd</sup>, 1901, the said judge of this court made the statement that if it were not for his decisions as judge on the election bill, the prison bill and other important matters, there would not be a Democrat holding office at the capitol of this State; and this affiant believes that if said Cantrill presides as the trial judge on the next hearing of this case, his political candidacy will prompt him to make such unjust rulings against this defendant as will tend to this defendant's conviction and be used by said Cantrill to further commend himself to the favorable consideration of his political party,



the former conviction of this defendant having been used as a political influence in the campaign of 1900, by the political associates of said Cantrill. The affiant further states that the said judge of this court, who is also the judge of the Franklin circuit court, at the September term of the said Franklin circuit court, in delivering his charge to the grand jury, referring to the shooting of President McKinley, among others expressions used the following:—

“Whilst this is the case, and whilst our citizens are gathering in  
“public assemblages and expressing by resolutions their con-  
“demnation of that act, while the pulpits throughout this country  
“on yesterday sent up supplications to the throne of grace that the  
“life of the President might be spared, which all of us sincerely hope  
“for, I desire to say to you gentlemen in all candor and in all  
“seriousness that it has not been two years since this grand old  
“Commonwealth was shaken from center to circumference by a  
“similar tragedy. In the light of broad day, upon the capitol

“square of your city, one of the proudest, the ablest, the most  
382 “respected citizens of your Commonwealth was stricken

“down in somewhat similar manner. It is an old adage,  
“but is a true one, that times change and men change with them  
“At the time of that occurrence and when the law-abiding and  
“liberty loving people of the Commonwealth were condemning that  
“action it is deplorable and humiliating to have to admit that there  
“were certain elements within the Commonwealth of Kentucky  
“that, if they did not openly approve of the act, were at least will-  
“ing to excuse it, not only willing to excuse it, but many of them  
“were willing to shield the criminal whoever he might be. At that  
“time there were no public meetings upon the part of the people  
“who are now proposing to denounce anarchy and anarchism. The  
“pulpits, as a rule, sent up no supplications to the throne of grace  
“that the life of William Goebel should be spared to this Common-  
“wealth. If there were any expressions or indications as to the feel-  
“ings of the pulpit, (the same pulpits in Kentucky who are now  
“fulminating their thunderbolts against anarchists and anarchism,  
“which is all right and of which I approve) at that particular time  
“the public knew nothing of them and if there were any prayers to  
“the throne of grace, they were secret prayers that the life of that  
“brave citizen should not be spared but that the party who was making  
“the contest against him for office should be his successor. I know  
“whereof I speak. You know the character and you know the con-  
“duct of the pulpits in your community at that time and I am ad-  
“vised and I know that throughout the length and breadth of the  
“State of Kentucky, with but few exceptions, there was no condem-  
“nation of anarchy and anarchism nor was there any denunciation  
“of the assassin. In addition to that, there was a portion of your

“public press which not only before the culmination of  
383 “of that great crime winked at it if they did not approve

“and encourage, but after the culmination of that offense  
“deliberately asserted that no body knew and nobody could find

"out who the assassin was, and charges and counter-charges were made. There was no effort on the part of those in power, except the civil officers of your county, to ascertain and arrest the guilty parties and when the civil officers of this county undertook to perform their duty and presented themselves upon the capitol square of this city they were confronted by an armed body of men who had been gathered there for a purpose which nobody has ever attempted to explain and which has been up to this time unexplained. I mention these facts, gentlemen, because I am determined that history shall be vindicated. I do not want nor do I intend so far as I am concerned that the people of this Commonwealth shall forget the great crime and outrage that has been perpetrated within its borders and as the outcome of it these same people who are now as I said awhile ago fulminating their thunder-bolts against anarchy at this time and ever since up to this time have been the great defenders of civil liberty leagues and defenders and apologists for the armed mobs who should congregate in one end of the State and march to the capitol city of the Commonwealth to defy law and order and the civil authorities there in power.

"Not only that, but after a grand jury of this county had made due indictments and after a party had become a refugee from justice and had taken asylum in an adjoining State, the requisition of your governor was peremptorily refused and that same refugee, assured and protested by four governors of sister States, made a

384 "triumphant tour to a national political convention at Philadelphia, with the absolute assurance that during that journey no officer of the law should execute the processes issued by the governor of your Commonwealth. And it is a lamentable fact, if history be correct, and if the newspaper prints properly published that the man who is now the second great officer of this great nation, then the governor of the State of New York, openly and above board, assured the refugee from justice and boasted of the fact that if he came within his jurisdiction he should receive ample and proper protection.

"These are the facts that became and are a part of the history not only of this Commonwealth but of the great nation in which we live. And after one governor who had refused the requisition of the governor of this State had gone out of office and had been succeeded by another governor, if reports be true, of which I do not vouch, but it was so published at the time; that governor when approached by a reporter of the press and asked what his intentions were as to the surrender of that fugitive from justice from Kentucky, gleefully announced that the climate of Indiana was agreeing very pleasantly with the gentleman who was sojourning therein. I do not mention these facts in any spirit of animosity. I do not mention them with any feelings except a feeling that I desire that the majesty of the law shall be vindicated. I not only mention these facts but I want to mention some additional facts.

"Our memories are short. Some of us are prone to forget and I mention the additional fact that there are indictments pending to-day in this court and they have been pending for a year and a half. Bench warrant after bench warrant have been issued and sent to the sheriffs of the home counties of those defendants and not one of these bench warrants has been executed, notwithstanding the fact, so far as I have been able to gather, that those parties remain at their homes, can be seen upon all public occasions and that the sheriff comes in contact with them from month to month and never makes any effort to execute any bench warrant.

"Yet, with this namby-pamby sentiment that has permeated to a certain extent out Commonwealth not until we are brought face to face with the fact that the great President of the United States is subjected to the same misfortune and can be stricken down in the same manner that any other citizen of this or any other Commonwealth can be stricken down, do these parties hold up their hands and proclaim for the majesty of the law. As I said we had a certain portion of the public press in Kentucky that not only approached the border of endorsing the assassination of Governor Goebel, at that time but ever since has been apologizing that such a thing was done and has been trying to mislead public opinion upon the idea that some crank or possibly as they insist some personal friend of the deceased was guilty of that enormous crime. And yet from the time the grand jury first presented an indictment down to the present time that press has never failed to take advantage of every occasion and every opportunity to vilify, denounce and defame the officers of this court and of the other courts where the cases have been pending. They have not hesitated one instant to denounce every juror who has ever tried any one of these cases as a perjurer and bribe-taker. They have denounced the Commonwealth's attorney and the judge of the court as being unfit for the positions they hold and have offered all and every excuse that it was possible to offer for the trials upon the part of the defendants. It is not my purpose nor do I intend to review

any of those trials but I do not hesitate one moment to denounce their conduct in making these assaults upon the officers of the courts, upon the sheriff and police and upon the juries, upon the Commonwealth's attorney and upon the judge, as being the conduct of a lot of lecherous, libelous, cowardly curs that no community ought to tolerate.

"These suggestions I have felt it was my duty to submit to you. My manhood revolts at the idea that a public official whoever he may be from the highest to the lowest cannot discharge his duty without subjecting himself to the danger of receiving at an untimely moment the assassin's bullet."

"If it be approved in one instance—if it be overlooked in one instance—if it remain uncondemned and unpunished in one instance, where is the official from the highest to the lowest in your land

"who can undertake to perform his duty according to his conscientious convictions without being subjected to the burdens and the risks that President McKinley has come in contact with at Buffalo.

"I pray and sincerely hope that he will be spared to the people. I prayed and sincerely hoped that William Goebel would be spared to the Commonwealth of Kentucky. Notwithstanding that some of you gentlemen know, and if you do not know, the officers of this court know that there has not been a time since the prosecution commenced up to the present time that the officers of your court, including your judge, have not been weekly and monthly threatened with assassination for their efforts to discharge their duties. But I speak not only for myself but for my associates, officers that come weal or woe so far as the discharge of our duty is concerned in the prosecution of the pleas of the Commonwealth and so far as my deliverances to the juries are concerned I shall never swerve and I know they will never swerve one iota from the discharge of their conscientious duties. I appeal to you

387 "gentlemen to discharge your duty faithfully and honestly and appealing to you to do that, I appeal to you to stand by the officers of your Commonwealth in the faithful performance of their duties. Unless they are backed up by the grand and petit juries of the country and by the intelligent sentiment and opinion by the moral and physical courage of every lover of his family and of his Commonwealth, our government will come to naught, and while you may not live to see it, the time is not far distant when we shall be called to meet, front to front, and face to face, hosts of lawlessness, of anarchism, of desolation and revolution."

Affiant further states that the political complexion of Scott county is, he is informed and believes about 55 % Democratic and 45 % Republican, including the colored vote, which is almost entirely Republican, but which is only 20 % of the entire vote of the county, and that by reason of the refusal of said Cantrill to draw the names from the jury wheel as requested by his counsel on the former trial, he was deprived of a fair and impartial trial, by reason of the fact that the jury that tried him was composed entirely of Democrats or men having inclinations to the Democratic party, with possibly one exception.

The affiant further says that in the appointment of jury commissioners for this county in October, 1900, to select for the jury wheel the names of persons for jury service for the coming year, and which selection was subsequent to the former trial of this defendant on the charge herein, that said commissioners were selected by said Cantrill, from those politically hostile to this defendant and who desire his punishment—all three of them being of opposite political faith to this defendant, and supporters of the late William Goebel ; 388 and he says that when said election was made it was in view of the politics of the men selected—the said judge well knowing their bias and prejudice against the defendant and believing they would be governed in their selection of names for said wheel by

reason thereof. He says that there were many hundreds of citizens of this county legally qualified for the service of commissioners of like political faith with the defendant, and this was well known to said judge. He says that as the result of the above facts, sixty-three of the sixty four names drawn from the jury wheel at the February and May terms of this court, 1901, were the names of persons politically hostile to this defendant, indicating as affiant believes, that all the names, with rare exceptions, remaining in said wheel are those of persons opposed to this affiant politically and who desire that he be punished on the charge herein. The affiant further says that, since the trial hereinbefore had, the said judge of this court has openly avowed his hostility to this affiant and stated that he had no use for this affiant, such statement having been made by said Cantrill to Mr. C. K. Wallace at Frankfort, Kentucky.

Affiant further says that within the last few days he has been transferred from the jail at Frankfort to the jail at Georgetown, Kentucky, and that since his commitment to the Georgetown jail, as further evidence of his continued hostility to this defendant the said Cantrill has given orders to the jailer of Scott county to allow no ministers of the Gospel or women to visit him at the jail.

Caleb Powers says the statements in the foregoing affidavit are true as he believes.

CALEB POWERS.

Subscribed and sworn to before me by Caleb Powers this 7<sup>th</sup> day of October, 1900.

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JAMES B. FINNELL, Jr.,  
Examiner for Scott County, Ky.

Scott Circuit Court, October Term, 1901.

COMMONWEALTH, Plaintiff,	} Affidavit.
VS.	
CALEB POWERS, Defendant.	

The affiant J. N. Reed says he is jailor of Scott county, Kentucky, and has in his custody the defendant Caleb Powers; that since said Caleb Powers has been in his custody, on the — day of October, 1901, the sheriff of Scott county, Thomas Shuff, delivered to him a message from James E. Cantrill, judge of the Scott circuit court, directing him to allow no preacher or women to see or talk to Caleb Powers while under his care in said jail.

The affiant further says he frequently attended the sittings of the Scott circuit court during the former trial of the defendant and has read the affidavit of Caleb Powers, prepared to be filed for the purpose of having the said Cantrill vacate the bench herein and believes the statements therein to be true. He says he does not believe the said Cantrill will afford the defendant, Caleb Powers, a fair

and impartial trial. He furthermore says that he is personally acquainted with John Bradford, M. H. Haggard, and Ben. F. Mallory, the jury commissioners of this county. That all of said parties are men of strong political feeling and followers of the late William Goebel.

He furthermore says that he knows the politics of the men whose names were drawn for a jury service in the Scott circuit court at the February, 1901, and May 1901, terms of this court and that the statements contained in the affidavit of the defendant in relation to said men is true as he believes.

J. N. REED.

Subscribed and sworn to before me by J. N. Reed, this 7<sup>th</sup> day of October, 1901.

LLEWELLYN F. SINCLAIR,  
Ex. Scott County, Kentucky.

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Scott Circuit Court.

October Term, 1901, October 8<sup>th</sup>.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

Came attorney by attorney and upon affidavit heretofore filed moved the judge of this court to vacate the bench during the pendency of this trial, which motion having been heard by the court was over-ruled, to which ruling of the court in refusing to vacate the bench the defendant by attorney excepted.

COMMONWEALTH OF KENTUCKY }  
vs. } Motion and Order.  
CALEB POWERS.

Comes the defendant by counsel and shows to the court that the mandate of the court of appeals reversing the judgment heretofore entered herein, was endorsed, filed by the clerk of this court on July 23<sup>rd</sup>, 1901 and that there has been no term of this court since said mandate was issued, until the present (October) term, 1901, and that said mandate was not filed in open court or noted of record in open court until yesterday, to-wit, October 7<sup>th</sup>, 1901, and no order entered herein until Oct. 7<sup>th</sup>, 1901, setting aside the former judgment herein as directed in said mandate.

Therefore the defendant moves the court to place this case upon the docket of this court for the next (February) term of this court for trial and the court having heard the argument of counsel,  
392 it is now ordered that this motion —, and the same is over-ruled, to which defendant excepts.



The defendant then moved the court to continue the case until the next term of this court upon the ground that the cause does not stand for trial at this term, and because the mandate of the court of appeals in this case was only filed and noted of record at this term of this court, the court over-ruled the motion to which ruling of the court the defendant at the time excepted.

Thereupon the defendant moved the court to set this case for hearing at some future day of this term to give the defendant time to prepare for trial, the court overruled this motion, to which the defendant at the time excepted.

Scott Circuit Court, October Term, 1901, October 9<sup>th</sup>.

COMMONWEALTH OF KENTUCKY }  
 VS. }  
 CALEB POWERS.

Came the parties to this action, the Commonwealth announced ready for trial; the defendant appeared in person and by attorney and moved the court to grant time to prepare affidavits and grounds for a continuance. Thereupon the court granted the time asked.

303 Scott Circuit Court, October Term, Oct. 10<sup>th</sup>, 1901.

COMMONWEALTH OF KENTUCKY }  
 VS. }  
 CALEB POWERS.

Came the defendant and moved the court to grant him additional time to furnish his affidavit for a continuance and the court granted him time until 2 o'clock p. m. At two o'clock p. m. the defendant asked further time to complete his affidavit and the court granted further time until five o'clock. The defendant asked further time until seven o'clock p. m. which was granted and at that hour came the defendant and filed his said affidavit and moved the court to continue the prosecution until the next term of court. The motion of the defendant to continue this prosecution coming on to be heard upon the affidavit of the defendant and the attorney for the Commonwealth having agreed in open court that the statements of the witnesses as set forth in the affidavit for continuance would be admitted to be read as the evidence of the absent witnesses upon the trial of this prosecution subject to objections and exceptions as to relevancy and competency and thereupon the court over-ruled the motion for a continuance to which the defendant then and there excepted and the defendant then moved the court that the statements of the absent witnesses as set out in the said affidavit be admitted as true upon the trial of this prosecution or that the case be continued,

to which the attorneys for the Commonwealth objected and the court sustained said objection and refused to require the Commonwealth's attorney to admit said statements as true, and declined to continue the case to which ruling of the court the defendant then and there excepted.

Before motion for continuance was passed upon by the court the Commonwealth's attorney moved the court that attachment be awarded against such of defendant's absent witnesses as the affidavits shows were subject to attachment and for alias subpoenas for such absent witnesses of defendant as had not been served with subpoenas issued for them in this case to issue for defendant which motion was sustained, and said subpoenas and attachments were ordered so to issue by the court.

The affidavit for continuance referred to in the foregoing order is as follows:—

\* \* \* \* \*

429 Scott Circuit Court, October Term, Oct. 11<sup>th</sup>, 1901.

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

At the night session of this court on yesterday, and after the motions for continuance had been over-ruled, the work of selecting a jury was begun, and of the regular panel, the following qualified as jurors, to-wit:—Robert Gale, J. P. Haley and Robt. Coleman, who were admonished by the court and placed in the custody of the sheriff, who was also sworn and duly admonished by the court as required by law, until this morning at nine o'clock, and the regular panel being exhausted the court of its own motion drew from the jury wheel the names of 82 jurors, a list of whom was given to the sheriff, who was ordered to summon said jurors to appear in this court at 9 o'clock this a. m. this matter having been by over-sight of the clerk of this court, omitted from yesterday's orders, it is ordered that the same be entered of record now for then.

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

Defendant moved the court for attachments returnable, Monday October 21<sup>st</sup>, 1901, for such of his witnesses as shall be shown upon a list to be furnished the clerk and for alias subpoenas returnable the same day against such witnesses as may be shown upon a list to be furnished to the clerk which motion was sustained, and defendant thereupon moved the court to make the same order herein as to the attendance of such of defendant's witnesses as are financially unable to pay their expenses as was entered by the

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court upon the former trial herein. To this last notion, the Commonwealth objected and said objection was sustained and the motion over-ruled to which defendant excepted.

COMMONWEALTH OF KENTUCKY }  
 VS.  
 CALEB POWERS. }

When the jurors appeared in the box this morning, one of them, to-wit, J. P. Halley, stated to the court that he was sick and unable to sit on the jury; the counsel for the Commonwealth and also the defendant were asked by the court if they had any objection to the juror being excused and each stating that they had nothing to say, the court thereupon excused said juror.

COMMONWEALTH OF KENTUCKY }  
 VS.  
 CALEB POWERS. }

The regular panel of the jury having been exhausted the judge of this court drew as a special venire 82 names from the jury wheel (said names being all the names remaining in said jury wheel of this county) and said list of names was delivered to the sheriff of this county, he was ordered and directed to summon said persons named in said list as jurors for this day and it appearing that all of said persons as shown by the sheriff's return herein were summoned and appeared in court except ten thereof, who were returned as not being in this county, and five who were returned as sick or who had serious sickness in *his family*, and ten of whom did  
 431 not respond to said summons, those who did not respond to said summons are returned by the sheriff of the county, to-wit:—J. N. Hawkins, George Donison, John H. Jones, Gano Shropshire, Chas. Hammons, Beal L. Fightmaster, T. K. Jones, Mat Taylor, and Joseph C. Smith as not found. It is now ordered that the sheriff summon said last ten named persons to appear in this court on to-morrow morning at 9 o'clock a. m. to be questioned as to their qualifications as jurors herein.

And it further appearing to the court that a jury cannot be had in this county for the trial of this cause, the sheriff of this county is directed and ordered to at once proceed to the county of Bourbon and summon a special venire from said county of one hundred good citizens and house-keepers of said county to appear in this court to-morrow morning at nine o'clock a. m. to answer as to their qualifications as jurors herein.

COMMONWEALTH OF KENTUCKY }  
 VS.  
 CALEB POWERS. }

The following is a list of the jurors summoned by the sheriff of this county as shown by his return on the list, furnished by him *by*

the court as drawn from the jury wheel of this county, as a special venire from which to select a jury to try this cause now on trial :—  
 Jas. Jackson, Thomas Burgess, Thos. Ratcliffe, Rufus Lancaster, J. W. Briscoe, Alvin Brookings, Robt. Ward, Geo. W. Mulberry, W. S. Downing, Lafe Robinson, At Peny, J. E. Vance, Ben F. Ford, Robt Sprake, Joe Gardner, W. T. Stockdale, J. S. Wilmot, Bud Fightmaster, John Hambrick, Eugene Marshall, Andrew Gribble, Wm. H. Graves, B. S. Calvert, Jeff D. Lancaster, A. L. Ferguson, Jas. Mulhollen, Key Perry, Thos. Feeler, Geo. W. Ware, Joe B. Ward,  
 432 Wm. Carrick, Joe Evans, J. C. B. Fightmaster, Leo Thomas, John W. Barkley, Jas. Viley, Cash Moris, J. B. Rickets, Sam A. Ratcliffe, Howard Triplett, Thos. H. Allen, Jos Finley, Abe Warth, Thomas Kitchen, A. B. Barkley, Virgil Lancaster, James E. Vaulandingham, Robt Mulberry, L. S. Burgess, John G. Paris.

## COMMONWEALTH OF KENTUCKY }

VS.

CALEB POWERS.

Came again the parties to this trial, the selection of the jury begun on yesterday was again resumed and after the following qualified as jurors, to-wit : T. E. Gale, Joseph Gardner, At Perry, Eugene Marshall, B. S. Calvert, J. D. Lancaster, J. C. B. Fightmaster, Andrew Gribble, James D. Vaulandingham, Thos. Jones and George Mulberry, but not having time to complete the selection of said jury, those in the box were given the usual admonition of the court and placed in the custody of the sheriff who was sworn to keep them together during the adjournment of the court.

433 Scott Circuit Court, October Term, Oct. 12<sup>th</sup>, 1901.

## COMMONWEALTH OF KENTUCKY }

VS.

CALEB POWERS.

The following is a list of the jurors summoned by the sheriff of this county as shown by his return of a special venire from Bourbon county from which to select a jury to try this case as directed and ordered by this court on a former day of this term, to-wit :—George Rossenfoss, J. E. Grace, M. F. Clark, C. J. Lancaster, J. W. Boardman, B. C. Ingles, George Judy, J. W. McLain, Joseph Quisenberry, W. B. Nichols, Claud Redmond, G. B. Speaks, S. T. James, W. P. Pinkard, Robt. Link, J. D. Owens, Gus Pugh, G. R. Ashurst, W. H. Ingles, Henry Isgrigg, Rudolph Davis, Bailey Arker, W. H. Speaks, J. E. Ford, Hatfoeld, Boppert, Gray Smith, A. G. Savage, Ed Burk, B. B. Marsh, N. Bayless, Wm. Doty, J. T. Hedges, John Tarr, Joseph McClellan, J. S. Mock, Russel Mitchell, J. M. Bedford, S. C. Paul, T. E. Rawlins, G. W. Bryant, W. F. Carpenter, E. P. Thomasson, F. B.

Vimout, J. W. Ingles, E. M. Ingles, T. D. Judy, Stiles Sherman, W. D. McIntire, G. E. Allen, M. H. Currant, G. W. Judy, C. N. Johnson, C. W. Covington, J. B. Graham, Marion Johnson, Billy Johnson, B. F. Lancaster, J. W. Payne, J. W. Collins, R. C. Chancellor, Geo. F. Jones, J. J. Peed, J. C. Flaughter, W. H. O'Neal, J. S. Clark, I. Chancellor, Louis Meriner, Fletcher Mann, C. F. Didlake, Chas. Clark, Ed Case, W. R. Scott, J. J. Scott, J. A. Gilkey, J. J. Redmon, B. F. Hopkins, Joe Hart, George Moor, Charles Gilkey, J. W. Mitchell, R. M. Rice, Mason Tolbert, Ben Judy, Tom Bradley, Abe Jackson, George Gattson, R. G. Bishopn, T. D. Tolbot, Ed Rice, John Sweeney, H. P. Moore, B. F. Myers, Jeff Walls.

434 COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Defendant by counsel filed the affidavit of J. P. Hutchcraft, and moved the court to excuse J. D. Owens for cause to which motion the attorney for the Commonwealth objected. The motion was over-ruled and defendant excepted.

The affidavit of Hutchcraft referred to in the above order is as follows:—

435 Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 POWERS. } Affidavit.

The affiant, J. P. Hutchcraft, says he is a resident of Bourbon county, Kentucky, and that just after the defendant herein had been arrested he, this affiant, heard J. D. Owens who is now occupying the jury box herein, say on Main St. in the city of Paris, Ky., referring to Powers, defendant and others charged with him in substance these words, "We have got some of them and we will get all of them" and in using said expression the said Owens manifested a great deal of feeling against Powers and was much elated at his arrest.

J. P. HUTCHCRAFT.

Subscribed and sworn to before me by J. P. Hutchcraft, this 12<sup>th</sup> day of October, 1901.

JAMES B. FINNELL, JR.,  
 Examiner for Scott County, Kentucky.

436 COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

By agreement of the Commonwealth and defendant and the approval of the court, J. U. Boardman, heretofore sworn and excepted as a juror, is now excused.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

The court having heretofore ordered the sheriff of this county to summon a special venire to appear in this court on this day, and it appearing that said sheriff summoned a special venire of 93 men and the said list having been exhausted without securing a jury to try this cause, the sheriff of this county is now ordered and directed to proceed at once to Bourbon county and summon a special venire from said county of 75 good citizens and house-keepers of said county, to appear in this court on next Monday morning at 9 o'clock a. m. to answer as to their qualifications as jurors herein.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Came again the parties to this trial and the selection of a jury herein heretofore begun was again resumed, and the following to-wit, R. F. Gale, Joseph Gardner, Eugene Marshall, B. S. Calver, Jas. U. Vallandingham, George Mulberry, M. F. Clark Robt. Link, Henry Isgrigg, and B. F. Hopkins were qualified, selected and sworn as jurors in this case, but not having time to complete the selection of said jury, those in the box were given the usual  
 437 admonition of the court and placed in the custody of the sheriff who was sworn to keep them together during the adjournment of the court.

Scott Circuit Court, October Term, Oct. 14", 1901.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

The defendant come and asked leave of court to enter at this time the motion and the affidavit of defendant *and* in support thereof tendered herein on Saturday; the court refused to permit the motion to be entered during the time the jury was being made up and to this ruling of the court the defendant excepted.

The court thereupon permitted said motion to be tendered together with said affidavit and the same is now noted as tendered.

The motion and affidavit above referred to are as follows:—



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Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY }  
                                   *vs.* } Motion.  
 CALEB POWERS. }

The defendant, Caleb Powers, now comes and moves the court to suspend the further holding of night sessions for hearing evidence during the trial of this cause, and in support thereof, now files his own affidavit and the statement of his counsel.

439

Scott Circuit Court, October Term, October 14", 1901.

COMMONWEALTH OF KENTUCKY }  
                                   *vs.* }  
 CALEB POWERS. }

The motion heretofore tendered in this case, is now entered and in support thereof the affidavit of defendant is now filed and noted and the defendant also moves the court as set out in writing as follows:—" Comes the *jury* after the jury was completed and before it was sworn and moved the court to discharge the panel and filed the supplemental affidavit of Caleb Powers, in support of said motion which affidavit is now noted of record as filed," to which motion the Commonwealth by attorney objected and filed the affidavits of Victor F. Bradley, Asa S. Nutter, deputy sheriff of Scott county, George Robinson, deputy sheriff of Scott county, Wallace Mitchell, deputy sheriff of Bourbon county, T. Carl Ashbrook, and Dennis Dundon of Bourbon county and J. A. Brannock and W. A. Rogers, deputy sheriffs of Scott county; and defendants filed additional affidavits of Caleb Powers and the affidavit of F. M. Snavely, J. N. Reed, H. R. Croxton, L. F. Sinclair and W. E. Bates, each of which are now noted. Said motions were heard by the court and overruled, to which the defendant excepted.

The affidavits referred to in the foregoing order are as follows:—

440

Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY }  
                                   *vs.* } Statement of Attorneys.  
 CALEB POWERS. }

The undersigned attorneys for the defendant, Caleb Powers, respectfully ask the court to grant the motion of the defendant, Powers, for a suspension of the night session during the further hearing of the evidence in this cause, not only for the reasons disclosed in



sultations increases progressively with the introduction of each additional witness, and the defendant earnestly asks the court to grant the relief sought by his motion.

Caleb Powers states that the statements in the foregoing affidavits are true as he verily believes.

443

Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs.  
 CALEB POWERS, Defendant. }

This affiant states that he ought not to be required to go to trial before a jury drawn from the wheel for service at the present term of this court or already summoned from the county of Bourbon, for the following reasons, namely:—

That the political canvass in this State in 1899, in which the late William Goebel was a candidate for the office of governor was a heated and angry one, and tended to create great antagonism in the minds of his political adherents against those who opposed him; that this canvass was followed by a contest before the State legislature for said office, in which the deepest and fiercest passions were stirred in the minds of his followers in this county, as well as in the other counties of the State, including the county of Bourbon; that during that contest the said Goebel was killed, which killing tended still further to deepen and intensify the political passions of his friends and admirers in this county and in the county of Bourbon and throughout the State, against this affiant, who was a candidate for a State office on the Republican ticket in the said year of 1899. The passions thus created have since that time been stimulated and fed by the political contests which have since followed, and are still in existence in this county and Bourbon county. Affiant says that — a special term of this court, July, 1900, he was put on trial in this county charged with being an accessory before the fact to the killing of said William Goebel, and was by the jury found guilty. From the judgment of the court at that  
 444 term, the affiant appealed to the appellate court, the appeal being taken in the early part of September of said year; that at the subsequent October term of said court, jury commissioners for this county were selected, whose duty it was to select a large number of names and place them in the jury wheel for service during the year of 1901. The three commissioners appointed were John Bradford, Ben Mallory and H. M. Haggard, all three of whom were partisan supporters and allies in the contest referred to of the said William Goebel deceased. The said jury commissioners discharged the work assigned to them by placing in said jury wheel the names of two hundred citizens of Scott county for purposes of said jury service; that at the February term 1901, of the circuit court of this

county and at the May term of the said year, seventy-five or more names were drawn from the jury wheel for said service; that at the present term there was drawn from said jury wheel for the purpose of securing a jury in this case, about 125 names, that being the entire number of names placed in the wheel. Affiant further states that at the regular State election of 1900, in the county of Scott there were cast for the Democratic candidate in round numbers 2500 votes, and for the Republican candidate in round numbers 2100 votes; that of these 2100 votes, not less than 1300 were white voters of equal character, standing and intelligence with the white voters who cast their votes for the Democratic party at said election.

Affiant says that despite these conditions which were shown to exist in this county, that of the two hundred names placed in the jury wheel by the aforesaid commissioners and drawn out as herein described, only five were supporters of the Republican party,

the other 195 being active partisan friends and supporters of  
 445 the party with which William Goebel was identified as its leader, and whose minds and passions have been inflamed against this affiant by continued political agitation. The affiant further says that of the five Republicans whose names were placed in the jury wheel for jury service by said commissioners as before stated, one man drawn for service at the Feb'y term of this court, 1901, and another at the May term; of the remaining three, two of them at the present term disqualified themselves herein by previously formed opinions, and the fifth and last after qualification and acceptance on the *voir dire* was peremptorily challenged by the Commonwealth, although he was a citizen of character and standing. He says that it will be impossible under these circumstances for him to avoid being tried at this term of this court except by a jury composed entirely of his political opponents and exclusively made up of those who were the adherents and admirers of said Goebel, and it will be impossible for him to obtain a fair and impartial trial before any jury so constituted and formed. :

The affiant further states that the officers of this county who went to Bourbon county to summon the men for jury service, went directly to the sheriff of Bourbon county, who together with his deputies were earnest and ardent adherents, supporters and friends of the said William Goebel and opposed politically to this affiant; that the officers of this county consulted and advised with the said officers of Bourbon county as to the selection of the men summoned and that Wallace Mitchell, deputy sheriff of said county, James Burke, another deputy sheriff of said county, Joseph Williams, a constable of Bourbon county, and James A. Gibson, a guard for county prisoners in Bourbon county, all of whom are the political adherents of said Goebel, and politically opposed to this affiant,  
 446 and acted with them in making the selection and summoning said men; that the political complexion of Bourbon is almost equally Democratic and Republican, there being a slight majority in favor of the Democratic party; that of the Repub-

licans about three fifths are colored, but there are many hundreds of conscientious, fair minded and reputable citizens of said Bourbon county qualified for jury service of the same political faith as this affiant, a great many of whom could have been as readily and conveniently summoned, and who would give to both sides herein a fair and impartial trial, but that none of such persons were summoned, with the exception of two men, and with these exceptions ninety one of the ninety-three names appearing upon the list furnished this affiant as a correct list of the men summoned from Bourbon county, are the names of the supporters and adherents of said Goebel, and opposed politically to this affiant, and were summoned for jury service herein by reason of such fact, as this affiant believes.

Affiant further states that said Wallace Mitchell, the deputy sheriff of Bourbon county, is now a candidate for sheriff of said county, seeking an election at the hands of the supporters and adherents of said William Goebel, and is their nominee for said office. Said Mitchell in the fall of 1900 acted in summoning for jury service in this court in the case of Commonwealth vs. Youtsey indicted for the same offense as this affiant, and in making the selection of men to serve as jurors therein, made the statement that he would not summon a single Brown Democrat or Republican for such service, and he did not summon any such.

Caleb Powers says that the statements in the foregoing affidavit are true as he believes.

CALEB POWERS.

447 Subscribed and sworn to before me by Caleb Powers, the  
12" day of October, 1901.

L. F. SINCLAIR,  
Ex., Scott County, Ky.

448 Scott Circuit Court, October Term, 1901.

COMMONWEALTH }  
vs.  
POWERS. }

The affiant, Caleb Powers, defendant herein, says that the jury now selected and not yet sworn is composed exclusively of men who are politically opposed to him and that he ought not to be required to be tried before a jury so constituted; that he has exhausted his challenges and has no way to escape being so tried unless the court sustains his motions heretofore made by him and discharges said jury.

CALEB POWERS.

Subscribed and sworn to before me by Caleb Powers this 14" day of October, 1901.

L. F. SINCLAIR,  
Ex., Scott County, Ky.

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Scott Circuit Court, October Term, 1901.

COMMONWEALTH }  
vs. }  
POWERS. }

The defendant objects to the jury herein being formed from men whose names were drawn from the wheel of this county and the men summoned from Bourbon county for the reasons set out in this affidavit herewith filed and moves the court to discharge all the jurymen now in the box and to discharge the other men already summoned from Bourbon county and who have not been examined.

CALEB POWERS.

450

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }  
vs. } Supplementary Affidavit.  
CALEB POWERS. }

The affiant says that since the original affidavit and motion herein were offered on Saturday, the sixth day of this term, and which motion and affidavit were again made and tendered on the seventh day of this term and before the completion of the jury herein, there has been summoned from the county of Bourbon for jury service herein 75 additional jurors in addition to the 100 heretofore summoned from that county; and he says that all the statements of the original affidavit as to the political bias and prejudice of jurors summoned herein are true as to seventy four of the seventy five thus summoned.

He says that of the list of the seventy five there is only one in political sympathy with this affiant, the remaining seventy four being the intense partisans of the late William Goebel for complicity with whose killing this affiant is charged herein, and he says that for the reasons given in the original affidavit and also in this affidavit, that he cannot get a fair and impartial trial.

The affiant says the statements in the foregoing affidavit are true as he believes.

CALEB POWERS.

Subscribed and sworn to by Caleb Powers before me this 14<sup>th</sup> day of October, 1901.

L. F. SINCLAIR,  
Ex., Scott County.

451

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }  
vs. } Affidavit.  
CALEB POWERS. }

Comes Victor F. Bradley who is an attorney for the prosecution in this case and is and has been a resident of Scott county, Kentucky, for more than twenty five years.



He says that the jury commissioners of Scott county, viz: John Bradford, Ben Mallory and M. H. Haggard are all and every one, discreet, fairminded, sober, citizens, in every way qualified by character and intelligence and standing to make and do make fair and impartial jury commissioners.

He says that he knows the men whose names were drawn from the jury wheel of Scott county as jurors in this case, and that as he believes with one or two exceptions, they were sober, discreet citizens of this county; that they were men of character and good standing in the community and not selected so far as he is advised or believes for any other reason than that they were proper men for jury service.

VICTOR F. BRADLEY.

Subscribed and sworn to before me by Victor F. Bradley this October 14", 1901.

T. J. PENN, C. S. C. C.,  
By A. J. COFFEE, D. C.

452

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit.
vs.	
CALEB POWERS, Defendant.	

The affiants, Asa S. Nutter and George Robinson, deputy sheriffs of Scott county, Kentucky, state when they were, as such deputy sheriffs directed by the sheriff of Scott county to summon a venire issued for the obtaining of one hundred persons with the qualifications of jurors, to be brought from the county of Bourbon to the county of Scott in the afternoon of Friday, the 11" inst., that they immediately departed for Bourbon county; that they called to their assistance Wallace Mitchell, deputy sheriff of said county, James Burke, deputy sheriff of said county and George W. Bowen, sheriff of said county; that affiants stated to the said sheriff and the said deputy sheriffs of Bourbon county that they desired men who had the qualifications of jurors to serve in the Scott circuit court, and that the same would have to be in attendance of the said court at 9 o'clock a. m. on the following day. The affiants state that not one word was said about the politics of any of the persons ordered to be summoned as jurors; that the sole desire was to find and have in the Scott circuit court on the following morning a number of persons qualified to act as jurors, designated by the judge of the said court; and that on the following morning about eighty of those persons were in attendance at the Scott circuit court; that these affiants had no desire or purpose either for or against the defendant in the matter of selecting the jury, but devoted themselves with honest purpose to securing qualified persons as required by the

453 order of the court; and affiants state that any and all statements of the defendant contrary to this set forth in his affidavit and supplemental affidavit are untrue.

ASA S. NUTTER, D. S. S. C.  
GEO. S. ROBINSON, D. S. S. C.

Subscribed and sworn to before me by Asa S. Nutter, D. S. S. C. and Geo. S. Robinson, D. S. S. C. this 14<sup>th</sup> day of Oct. 1901.

T. J. PENN, C. S. C. C.,  
By A. J. COFFEE, D. C.

454

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

Wallace Mitchell, being first duly sworn, states that he is deputy sheriff of the county of Bourbon, State of Kentucky, and resides therein. That at 8 p. m. on Friday, October, 11<sup>th</sup>, he was called upon by Asa Nutter, a deputy sheriff of Scott county who asked him to assist him in summoning a number of men who had the qualifications of jurors to appear on Saturday morning, the 12<sup>th</sup> inst., at 9 a. m., at the court house in Georgetown, Scott county; that affiant as deputy sheriff proceeded with the sheriff of Scott county and there were summoned in his presence a number of men having the qualifications of jurors to appear at the court house in Scott county the next day at 9 a. m. Owing to the number of men required, the work was divided between certain deputy sheriffs of Scott county and in all about 93 persons were summoned by them. As this affiant is informed and believes, about eighty-one appeared at the court house in Scott county at about 9 a. m. on the following day; that all of the persons so summoned and appearing were known to this affiant, and that the men so summoned were sober, discreet, intelligent good citizens of Bourbon county; that in no instance, in so far as this affiant knows or believes, was any inquiry whatever made as to their religion or politics of any of the persons so summoned to serve as jurors.

Affiant has read the affidavit of the defendant in which the charge is made that all of the persons so summoned from Bourbon county, except two, were political adherents of the late William  
455 Goebel. Affiant knows that said statement is incorrect, and that many more than is indicated, of the persons so summoned as jurors, did as he is informed and believes, vote for William McKinley as President of the United States, and also voted against William Goebel at the time of his candidacy. Affiant further states that he has read the statement in the defendant's affidavit wherein he charges that this affiant when summoning citizens from Bourbon

county to serve as jurors on the trial of Henry Youtsey in the Scott circuit court, said he would not summon a single Republican or Brown Democrat. Affiant says that statement is untrue in every particular.

Affiant further adds that at that time, Republicans were summoned to appear in the Scott circuit court to serve on the said Youtsey jury.

Affiant states that he has also read the statement in defendant's affidavit to the effect that jurors were summoned from Bourbon county for jury service "because and by reason of their being opposed to this defendant politically, supporters and adherents of William Goebel, as defendant believed" and this statement affiant Mitchell says is untrue.

With reference to the summoning of the second venire of seventy-five jurors from Bourbon county, this affiant says that he had absolutely nothing to do with it, and said affidavit in so far as it refers to this affiant by making reference to the original affidavit filed is untrue.

Affiant Mitchell says that the foregoing statements of his are true as he verily believes.

WALLACE W. MITCHELL.

Subscribed and sworn to before me by Wallace W. Mitchell this October 14", 1901.

456

Scott Circuit Court.

THE COMMONWEALTH OF KENTUCKY }  
 vs. } Affidavit.  
 CALEB POWERS.

T. Earl Ashbrook and Dennis Duodon being first duly sworn state that they are members of the bar of Paris, Bourbon county, Kentucky, that on the 11" day of October, 1901, they were called upon by Robert B. Franklin, Commonwealth's attorney of Scott county, circuit court, to aid him in selecting a jury from among the persons summoned herein on a venire to Bourbon county.

They say that they have carefully examined the lists of jurors so summoned to appear in this court Saturday Oct. 12" at 9 o'clock a. m., and also the list as summoned to appear Monday, October 14", at 9 o'clock a. m. That they and each of them is personally acquainted with a very large percentage of all the said men so attending, in fact acquainted with nearly all of them. They say that of the 80 jurors in attendance here on October 12" affiants are of the opinion and belief, from their acquaintance with them, and also from information which affiants believe to be true and correct, that not less than eight of them were not supporters of William Goebel. And they further say that of the 74 jurors so in attendance here Monday October 14",

1901, affiant personally knows practically all of them (at least a very large percentage of them) and affiants are of the opinion and belief, from their said acquaintance, and also from what they believe to be reliable information, that not less than five of the said seventy four jurors are Republicans.

Affiants further say that all of said jurors brought here from Bourbon county on both Saturday and Monday Oct. 12", and 14" are, with one or two exceptions, affiants verily believe, men  
457 well qualified under the law to do jury service; that they are sober, discreet, honest, upright and intel-igent.

Affiants say that they have lived in Paris, Bourbon county, Kentucky, continuously during the last 13 and 32 years respectively.

T. EARL ASHBROOK.  
DENNIS DUNDON.

Subscribed and sworn to by T. Earl Ashbrook and Dennis Dundon, this October 14", 1901.

T. J. PENN, C. S. C. C.,  
By A. J. COFFEE, D. C.

458

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Affidavit.  
CALEB POWERS, Defendant.

The affiants, J. A. Brannock and W. A. Rodger, deputy sheriffs of Scott county, state that they were, as deputy sheriffs of Scott county, directed by the sheriff of Scott county to summon a venire issued for the obtaining of seventy five persons with the qualifications of jurors, to be brought from the county of Bourbon to the county of Scott in the afternoon of Saturday, the 12" inst., that they immediately departed for Bourbon county; that they called to their assistance Joe Williams constable and James Burke, deputy sheriff of said county; that affiants stated to said deputy sheriff and constable of Bourbon county that they desired men who had the qualifications of jurors to serve in the Scott circuit court, and that the same would have to be in attendance of the said court at 9 o'clock a. m. on Monday October 14", 1901. The affiants state that not one word was said about the politics of any of the persons summoned as jurors; that the sole desire was to find and have in the Scott circuit court on the following morning the number of persons, qualified for jury service, designated by the judge of said court; and that on this date seventy four of those persons were in attendance at the Scott circuit court; that these affiants had no desire or purpose, either for or against the defendant in the matter of selecting the jury, but devoted themselves with honest purpose to securing qualified persons as required by the order of the court; and affiants state that any and all statements of

the defendant contrary to this set forth in his, defendant's, affidavit and supplemental affidavit are untrue.

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W. A. RODGER, D. S. S. C.

J. A. BRANNOCK, D. S. S. C.

Subscribed and sworn to before me by W. A. Rodger, D. S. S. C. and J. A. Brannock D. S. S. C. this 14<sup>th</sup> day of October, 1901.

T. J. PENN, C. S. C. C.,

By J. A. COFFEE, D. C.

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The affiant says that he is a resident of Scott county, Ky., and of the Stamping Ground precinct; that he knows personally B. T. Calvert who is one of the jury for the trial of Caleb Powers on the charge of complicity in the killing of William Goebel and has known said Calvert personally for many years.

That on more than one occasion he has been present when the question of the guilt of the men who were indicted for said killing and complicity therewith, including the defendant Caleb Powers, was being discussed and at which discussion the said Calvert was also present.

He says that on such discussions when the opinion of persons present to the effect that all said indicted persons were guilty of said crime, which expression was, on more than one occasion, given, that said Calvert assented thereto and agreed with the opinions thus expressed.

F. M. SNAVELY.

Subscribed and sworn to by F. M. Snavely before me this 14<sup>th</sup> day of October, 1901.

JAMES B. FINNELL, JR.,

Examiner for Scott County, Ky.

461

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS. }

The affiant, J. N. Reed states that he is a resident of Scott county, Kentucky, and that he is acquainted with the jurors sworn to try the case of The Commonwealth of Kentucky against Caleb Powers who are from Scott county, Kentucky, and that he knows their political affiliations and knows that they are, without exception, of the same political faith as the late William Goebel and of different political faith from the defendant in the above styled cause.

J. N. REED.

Subscribed and sworn to before me this 14<sup>th</sup> day of October 1901.

JAS. B. FINNELL, JR.,

Examiner for Scott County, Kentucky.

462

Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit.  
 CALEB POWERS, Defendant.

The affiant, H. R. Croxton, states that he is and has been for forty years, resident of Bourbon county, Kentucky, and was for three years deputy assessor of said county, and is well acquainted with the citizenship of said county, and the political affiliations of the citizens thereof. He states that he has carefully and critically examined the lists of the men from Bourbon county summoned for jury service herein comprising names of 167 men, so summoned and that with the exceptions of M. H. Current (who is not a housekeeper) Milton Plummer and D. W. Peed, all those whose names appear upon said lists are and have been Democrats.

He says he is acquainted in the particular neighborhoods from which the men whose names appear upon said lists were drawn, and that there are many fair-minded, honest and impartial men qualified for jury service living therein of the same political faith as the defendant, and many of whom could have been as readily and conveniently summoned by the sheriff as those who were summoned and who could and would give to both sides herein a fair and impartial trial.

He further says that the six men from Bourbon county now in the jury box and whose names appear on said lists, are all of opposite political faith to the defendant, and adherents and supporters of said William Goebel, of whose murder the defendant is accused herein.

H. R. CROXTON.

H. R. Croxton says the statements in the foregoing affidavit are true as he believes.

L. F. SINCLAIR,  
 Ex., Scott County, Ky.

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Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit.  
 CALEB POWERS, Defendant.

The affiant, L. F. Sinclair, states that he is a citizen and resident of Georgetown, Scott county, Ky.; that he was born and reared in said county, and for the past five years has been intimately connected with the Republican county and campaign committees; that in said position he has investigated and inquired diligently as to the politics of the citizens of said county. He says that he has ex-



amined the lists drawn from the jury wheel to act as jurors in the Scott circuit court for the February, May and October term-, 1901, there being about two hundred names included in the number selected for said terms of this court, and out of these lists he is informed and believes there were only five Republicans. The names of said Republicans, being, to-wit, Mack Covington, Todd Rodger, D. Alsop, Bob Parker and Rob't Coleman.

L. F. Sinclair states that the statements in the foregoing affidavit are true as he believes.

L. F. SINCLAIR.

Subscribed and sworn to before me this — day of October, 1901.

JAMES B. FINNELL, JR.,

Examiner for Scott County, Kentucky,

Notary Public, Scott Co., Ky.

464

Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY, Plaintiff, }

vs.

CALEB POWERS, Defendant. }

Affidavit.

The affiant, W. E. Bates, states that he is and has been for seventy one years, a resident of Scott county, Kentucky and was for eight years county judge of said county; that he is well acquainted with the citizenship of said county and the political affiliations of the citizens thereof. He states that he has seen the list of names of those drawn from the jury wheel of this county for jury service at this term of the court who responded to the call of their names in court, and with the exception of one name thereon, all of said list are known to him to be Democrats.

He states that the six men from Scott county, who have been accepted upon the jury but not yet sworn, are known to him to be all Democrats and adherents and supporters of the late William Goebel.

W. E. Bates states the statements in the foregoing affidavit are true as he believes.

W. E. BATES.

Subscribed and sworn to before me this — day of October 1901.

JAMES B. FINNELL, JR.,

Examiner for Scott County, Kentucky.

465

COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS. }

Came the defendant by attorney and entered a general demurrer to the indictment herein. The court over-ruled the said demurrer to which ruling the defendant excepted.

## COMMONWEALTH OF KENTUCKY }

—  
CALEB POWERS.

Came again the parties to this trial, the selection of a jury begun herein on a former day of this term is now completed which jury is as follows:—R. F. Gale, Joseph Gardner, Eugene Marshal B. S. Calvert, James D. Vallandingham, George Mulberry, M. F. Clark, Rob't Link, Henry Isgrigg, B. F. Hopkins, L. Mussinon, S. W. Brierly who were duly sworn as a jury to try this case and a true verdict render. The hearing of the evidence was begun but not having time to complete the same this evening, the jury after receiving the usual admonition of the court, were placed in the custody of the sheriff, who was duly sworn to keep them together during the adjournment of the court.

## COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS.

The following is a list of the special venire summoned by the sheriff of Scott county as ordered by the court to be summoned from Bourbon county to appear in this court this morning to-wit, George Faulkner, Joe Farris, Rus Faulkner, Jas. Fisher, Ora Jones, Jack Currant, Berry Bedford, George Rankin, R. O. Turner, I. P. Oliver, George Currant, J. T. Speaks, Nathan Goodman, John Johnson, Grant Dutton, George Joppin, Joe Gardner, W. H. Fisher, George Redmond, Billy Dotson, F. H. Williams, G. W. Morrow, J. M. Endicott, R. L. Lancaster, R. F. Adair, L. B. Holt, George Stevenson, W. C. Stepp, R. F. Stepp, C. R. Hill, E. D. Sparks, A. J. Lovely, M. Plummer, W. H. Piper, J. R. Ewalt, Rob't Tolbert, J. H. Kenney, B. W. Dorsey, L. Talbert, Charles Wilson, Al Robert, Dick Wilson, John Connell, Wm. Williams, F. Letton, J. H. Butler, John Redmond, D. L. Smith, Wm. Beasely, E. T. Woodward, J. C. Long, B. S. Parrish, J. T. Doyle, Bob Terrell, W. H. Boone, Ed Bean, J. S. Jones, J. H. Wilson, N. Arns, Edgar Liver, Lee Stevenson, J. E. Estes, John Conway, Tom Garbon, George Allender, R. Hunt, W. L. Brannock, James Thompson, D. D. Peed, J. W. De Jarnett, J. B. Pryor, D. C. Hukill, L. Mussimon, S. W. Brierly.

Scott Circuit Court, October Term, Oct. 18", 1901.

## COMMONWEALTH OF KENTUCKY }

vs.

CALEB POWERS.

Motion.

The defendant Caleb Powers now comes and moves the court to suspend the further holding of night sessions for hearing evidence



noon sessions from 1:30 p. m. to 5 p. m., and evening session from 7 p. m. to 10 p. m. and the continuance of said three sessions of this court have and will more and more exhaust both his physical and mental strength and render him less able upon the conclusion of the evidence of the Commonwealth, to justly and properly deliver to the jury his own evidence on his own behalf.

He further says that since last Monday after the jury was sworn in this case he has had no reasonable and proper opportunity to confer with his counsel either as to the conduct of his case, the relation of the evidence heard by the jury to the many issues of fact involved in the case, or as to the necessary steps to be taken in securing or in marshalling when secured, the evidence on his  
470 own behalf, to meet the evidence tendered by the Commonwealth.

He says he has had scarcely any opportunity at all to confer with his counsel in the morning before court began, only a short time during the hours of the noon adjournment, and not much longer period upon the conclusion of the afternoon session and even less upon the adjournment of the night session at 10 o'clock p. m.

The defendant says that by reason of the three sessions a day of this court he is therefore denied a reasonable and proper opportunity to confer with his counsel, although the necessity of frequent consultations increases progressively with the introduction of each additional witness, and the defendant earnestly asks the court to grant the relief sought by his motion.

Caleb Powers states that the statements in the foregoing affidavit are true as he believes.

CALEB POWERS.

Subscribed and sworn to before me by Caleb Powers, the 17<sup>th</sup> day of October, 1901.

L. F. SINCLAIR,  
Ex. Scott County, Kentucky.

471 Scott Circuit Court, October Term, 1901.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Statement of Attorneys.
vs.	
CALEB POWERS, Defendant.	

The undersigned attorneys for the defendant, Caleb Powers, respectfully ask the court to grant the motion of the defendant, Powers, for a suspension of the night sessions during the further hearing of the evidence in this cause, not only for the reasons disclosed in the affidavit of the defendant, but they further represent to the court that no distribution among defendant's attorneys of the service or labor imposed upon them in the conduct of the defense of defendant has or can be made to supply the necessity of frequent

and full consultation with the defendant; such consultations are essential to that cooperation in service among the attorneys necessary to obtain for the defendant a fair and adequately just presentation of his defense.

JAMES B. FINNELL.  
H. C. FAULKNER.  
J. M. MORTON.  
W. C. OWENS.  
R. C. KINKEAD.  
JOHN W. DOUGLAS.  
JAMES C. SIMS.

Scott Circuit Court, October 19", 1901.

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

Came the attorney for the Commonwealth and stated to the court that the Commonwealth was ready to close its case if the jury be permitted to view the scene of the tragedy, and moved the court that the jury be permitted to go to Frankfort to view the scene of the tragedy, upon which motion the court took time.

Scott Circuit Court, October Term, Oct. 24", 1901.

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

Came again the parties to this trial. The jury heretofore sworn to try this case again appeared to further hear the evidence in this case. The court being advised upon the motion heretofore made, by the Commonwealth's attorney in regard to the jury viewing the scene of the tragedy, orders that the jury be conducted in a body in the custody of the sheriff of Scott county, on to-morrow morning, said sheriff having been duly sworn to not allow them to converse with anyone upon the subject matter of this trial and in the company of the judge of this court the defendant Caleb Powers and his attorneys and the attorneys for the Commonwealth to the capitol grounds at Frankfort, where the said judge of this court will point out to them the said grounds and buildings. The jury not having time

473 to complete the hearing of the evidence today were placed in the hands of the sheriff of this county who was duly sworn to keep them together during the adjournment of the court.

Scott Circuit Court, October Term, Oct. 25", 1901.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

The defendant, by counsel, moved the court to instruct the jury that they can only consider the testimony of the following witnesses, to-wit, J. E. Miles, R. D. Armstrong, John Henry Wilson, E. P. Barlow, John Rosseau, James Walker, John Daugherty, C. I. Canfield, John Stewart, Miss Lizzie Wollums, and James Sullivan introduced by the Commonwealth, in rebuttle for the purpose of effecting the credibility of the witnesses whom they were introduced to contradict and not as substantive testimony against the defendant. To which motion the Commonwealth by counsel objects in so far as it applies to J. E. Miles, R. D. Armstrong, John Henry Wilson, E. P. Barlow and John Rosseau, but makes no objection to the motion in so far as it applies to James Walker, John Daugherty, C. I. Canfield, John Stewart, Miss Lizzie Wollum and James Sullivan, and the court being advised over-ruled said motion as to J. E. Miles, R. D. Armstrong, John Henry Wilson, E. P. Barlow and John Rosseau, to which ruling of the court the defendant excepts.

The court sustained the motion as to James Walker, John Daugherty, C. I. Canfield, John Stewart, Miss Lizzie Woolums and James Sullivan.

474

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Came again the parties to this trial. The jury heretofore sworn to try this case having been conducted in a body by the sheriff of this county and in the company of the judge of this court and the defendant Caleb Powers, and his attorneys and the attorneys for the Commonwealth in compliance at an order of this court heretofore made, to the capitol grounds at Frankfort, the jury having viewed the said grounds, returned in the custody of the sheriff to the court room and the hearing of the evidence in this case having been completed the jury was given the instructions of the court and the argument of counsel was begun but not having time to conclude to-day, the jury after receiving the usual admonition of the court was placed in the hands of the sheriff of this co-nty who was duly sworn to keep them together during the adjournment of this court.



Scott Circuit Court, October Term, Oct. 26", 1905.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

Came again the parties to this trial. The jury heretofore sworn to try this case again appeared in their seats to further hear the argument of counsel, which being finished to-day the jury retired and afterwards brought into court the following verdict, "We the jury find the defendant guilty, and fix his punishment in the State penitentiary for life." B. S. Calvert foreman.

Whereupon came the defendant by counsel and filed a  
 475 motion and grounds for a new trial, which motion was heard by the court and over-ruled, to which ruling of the court the defendant excepted and prayed an appeal to the court of appeals, which was granted.

The motion and grounds for a new trial referred to in the foregoing order are as follows:

476 Scott Circuit Court.

COMMONWEALTH OF KENTUCKY } Motion and Grounds for a New  
 vs. Trial.  
 CALEB POWERS. }

The defendant Caleb Powers, now comes and moves the court to grant him a new trial upon the following grounds:

1. Error of the court in misinstructing the jury.
2. Error of the court in refusing to properly instruct the the jury.
3. The verdict is against the law.
4. The verdict is against the evidence.
5. Error of the court in the admission of evidence to the jury which was incompetent and irrelevant to the prejudice of the substantial rights of the defendant and to the admission of which the defendant at the time objected and excepted.
6. Error of the court in refusing competent and relevant evidence offered by the defendant to go to the jury, to which refusal of the court the defendant at the time excepted.
7. Error of the court in refusing to vacate the bench at the beginning of the trial; upon the motion of the defendant; and error of the court in overruling the defendant's motion that the judge of the court vacate the bench upon the grounds set forth in said motion and the affidavits filed in support thereof, to which ruling of the court the defendant at the time excepted.
8. Error of the court to the prejudice of the defendant in overruling defendant's motion to set this case down for trial at a day in

477 the next succeeding term of this court and thus allowing and permitting the defendant time for for the preparation for the trial of his case.

9. Error of the court to the prejudice of the defendant in overruling this motion to set the case down for a trial at a subsequent day during this term of the court for the purpose of allowing the defendant time for the preparation for the trial of this case.

10. Error of the court to the prejudice of the substantial rights of the defendant in overruling defendant's motion for a continuance of his case upon the grounds and reasons set forth in his affidavit filed in support of said motion, and error of the court in refusing to continue the case upon the motion of this defendant to which ruling of the court the defendant at the time excepted.

11. Error of the court, after refusing the continuance asked for by the defendant, in refusing the motion of defendant that the Commonwealth be required to admit the truth of the statements of the witnesses mentioned in the affidavit for a continuance in all cases where said witnesses did not appear during the trial and testify, to which ruling of the court the defendant at the time excepted.

12. Error of the court to the prejudices of the defendant's rights in overruling defendant's objection so the formation of the jury from the men whose names were drawn from the jury wheel of Scott county and the special venires summoned from Bourbon county and requiring the defendant to be tried before a jury so formed to which the defendant at the time excepted and still excepts, which motion was supported by the affidavits then filed.

13. Error of the court in overruling defendant's motion to suspend the night sessions of the court, which ruling of the court was to the prejudice of defendant and to which ruling of the court the defendant excepted at the time.

478 14. Error of the court to which defendant excepted, in refusing to sustain the motion of the defendant to require the Commonwealth to admit as true the statement of certain witnesses embraced in the affidavit for a continuance and which the defendant offered to read to the jury as part of his evidence.

15. Error of the court in refusing to permit to be read to the jury statements of absent witnesses embraced in the affidavit for a continuance which statements the defendant offered to read, but the court refused to permit the defendant to read the same in full, but excluded a part of said statements, to which ruling of the court the defendant excepted.

The court refused to permit the defendant to read in full the statements of some of the absent witnesses offered by the defendant and refused to permit the defendant to read any part of the statement of Ben Rowe, the colored porter in the executive building. The statement of Ben Rowe, the defendant offered to read to the jury, the Commonwealth objected, the objection was sustained to which ruling of the court the defendant excepted. The errors above complained of were to the prejudice of the substantial rights of the

defendant and to the ruling of the court thereon the defendant at the time excepted.

16. Error of the court to the prejudice of the substantial rights of the defendant in permitting the Commonwealth over defendant-objection to introduce in rebuttal, witnesses as to alleged statement of one James Sparks, said Sparks having not testified at all in this case and the statements of said Sparks embraced in the affidavit for a continuance not having been offered by the defendant as evidence and not read to the jury.

479 17. Error of the court in giving to the jury over the objection of the defendant the instructions numbered from one to nine inclusive and in giving either of them and the court gave said instructions to the jury and each of them over the objection of the defendant and to such ruling of the court the defendant at the time objected and excepted.

18. Error of the court in refusing to properly instruct the jury upon the law of the case as asked by the defendant and the refusal of the court to give to the jury the instructions asked for by the defendant and numbered from one to thirteen inclusive, to which ruling of the court the defendant at the time excepted and the court refused and failed to give to the jury the whole law of the case to which the defendant at the time excepted; and the court refused to give to the jury instructions asked for by the defendant and particularly refused to give to the jury an instruction asked for by the defendant in lieu of instruction number four given by the court to the jury and to the refusal of the court to properly instruct the jury and the refusal of the court to give instruction in lieu of number four and the refusal of the court in giving any of the instructions asked for by the defendant, the defendant at the time excepted.

19. Error of the court in limiting the argument of defendant's counsel before the jury after the conclusion of the evidence and the instruction of the jury and error of the court in fixing four hours as the time within which counsel for the defendant were required to argue the case for the defendant before the jury; to said ruling of the court the defendant at the time objected and excepted.

480 20. Error of the court in permitting the Commonwealth's attorney over the objection of the defendant, in his argument before the jury, to make statements of assumed facts not in evidence. The court refused to exclude from the consideration of the jury the objectionable statements made by the attorney for the Commonwealth to which ruling of the court the defendant at the time excepted.

J. C. SIMS,  
J. R. MORTON,  
R. C. KINKEAD,  
W. C. OWENS,  
H. C. FAULKNER,  
J. B. FINNELL,  
JNO. W. DOUGLASS,  
JNO. S. SMITH,  
L. F. SINCLAIR,

Att'ys for Defendant.

481 Scott Circuit Court, October Term, Oct. 26<sup>th</sup>, 1901.

COMMONWEALTH OF KENTUCKY }  
vs.  
 CALEB POWERS. }

The defendant Caleb Powers was brought into open court and informed of the nature of the indictment, plea and verdict and asked if he had any legal cause to show why judgment should not be pronounced against him, and none being shown, it is adjudged by the court that the defendant be taken by the sheriff of Scott county to the State penitentiary at Frankfort and there confined at hard labor for the period of his natural life. To all of which judgment the defendant excepts and prays an appeal to the court of appeals, which is granted. The execution of the foregoing judgment is now suspended until sixty days after the first day of the next Feb. term, 1902, of this court, in order to give the defendant time to file the record herein and his appeal to the court of appeals, and it is ordered that the defendant be allowed until the first day of the next Feb. term, 1902 of this court, in which to file his bill of exceptions.

(Next order in regular order will be found on next page.—Geo. S. Robinson, C. S. C. C.).

482 Scott Circuit Court, February Term, 3<sup>rd</sup> Day of February, 1902.

COMMONWEALTH OF KENTUCKY }  
vs.  
 CALEB POWERS. }

This day came the defendant by counsel and tendered his bill of exceptions which is embraced and is contained in nine volumes numbered 1, 2, 3, 4, 5, 6, 7, 8, & 9 volumes numbered consecutively from one to 9 inclusive as above stated, which said bill of exceptions is now signed, sealed and made a part of the record without being spread at large upon the order book.

Scott Circuit Court, February Term, Feb. 6<sup>th</sup>, 1903.

COMMONWEALTH OF KENTUCKY }  
vs.  
 CALEB POWERS. }

483 This day came the defendant by his counsel and upon his motion the mandate of the court of appeals issued Dec. 13<sup>th</sup>, 1902, and heretofore filed in the clerk's office be and the same is now noted of record and is in words as follows:—

"THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, Sec. 3", 1902.

CALEB POWERS, Appellant,  
 VS.  
 COMMONWEALTH OF KENTUCKY, Appellee. }

Appeal from a Judgment of the Scott Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is to them erroneous. It is therefore considered that said judgment be reversed and cause remanded for a new trial under proceedings not inconsistent with the opinion herein, which is ordered to be certified to said court.

A copy.

Attest:

S. J. SHACKELFORD, C. C. A.,  
 By ROBT L. GREEN, D. C.

Issued Dec. 13", 1902.

And at the same time upon motion of counsel for defendant a certified opinion of the court of appeals rendered by said court upon the last appeal to said court of this cause, is filed and noted of record, and upon motion of said counsel and in obedience to said mandate of said court of appeals, the judgment of conviction rendered by this court in said cause at its October term, 1901, be and the same is now set aside and held for naught, and said defendant is now awarded a new trial herein.

COMMONWEALTH OF KENTUCKY }  
 VS. } Motion.  
 CALEB POWERS.

The mandate of the court of appeals and the opinion of said court, having been filed and noted in this cause, and the judgment  
 484 of conviction rendered in this cause at the October term of this court, 1901, having been set aside, the defendant by counsel, in the presence of the Hon. Rob't B. Franklin, Commonwealth's attorney, stated that the counsel representing the defendant and the Commonwealth were unable to agree upon the selection of a judge to try the case, and did then move the court to direct the clerk to certify said fact of said inability to agree to the governor of the State in order that he might appoint a judge to try the cause. To this motion the attorney for the Commonwealth objected, stating there was no vacancy.

Scott Circuit Court, May Term, May 5<sup>th</sup>, 1903.

COMMONWEALTH OF KENTUCKY }  
 vs. } Order.  
 CALEB POWERS.

Now comes the attorneys for the defendant herein, and moves that the judge of this court vacate the bench and also moved that in doing so he order the clerk of this court to certify to the governor that there is a vacancy so that the governor may appoint a special judge to preside in this cause; these motions are predicated upon the opinion of the court of appeals rendered upon the last appeal to that court. This opinion was concurred in by four of the judges of the court of appeals, while three of the judges of the same court dissented from the opinion of the majority. For a number of years the court of appeals in an unbroken line of decisions has laid down

425 the rule which ought to govern the trial judge in vacating the bench either in a criminal or civil case. This rule so clearly defined has not been violated unless it was the intention of the majority of the court to over-rule these well established precedents or unless it was the intention of that majority to ignore these precedents and establish a new rule for the guidance of all the trial courts of the State. If such was the intention the members of the bar and the litigants in the Commonwealth, as well as the judges of the circuit court ought to know what rule must prevail under similar circumstance. If it was intended by the majority of the court that a special rule was to be observed by the judge of the Scott circuit court, then the people of this judicial district, it would seem, ought to have been apprised of that fact. Whenever it has been made manifest by the court of appeals by established precedents or by new rules clearly defined by that court this judge will not only willingly but cheerfully obey its mandates. In thus seeking to ascertain what is the meaning of the majority opinion in this case, I mean no discourtesy or disrespect of the court of appeals or any of its members.

The attorneys for the defendant, who make this motion know of the courtesies and indulgencies granted them as well as their clients. They know that a change of venue was granted when opposed by the attorneys for the Commonwealth. They know that when it was made to appear that the defendant was unable to pay the expenses of certain of his witnesses to attend his first trial they were ordered subpoenaed for the Commonwealth, and then turned over to the defense, while the State paid their per diem and mileage while the trial lasted.

480 Let the motion asking that this judge make an order directing the clerk of this court to certify to the governor that a vacancy exists in the judgeship of this court for a trial of this case be and the same is over-ruled and this cause is held open until



the 14<sup>th</sup> day of this term to enable the attorneys for the defense to apply for a rule or a writ of prohibition so that the full intent of the court of appeals may be ascertained. To the action of the court in refusing to vacate the bench as moved by the defendant and the refusing to direct the clerk to certify to the governor the fact of a vacancy as moved by the defendant, the defendant at the time excepts and still excepts.

The Commonwealth, by its attorney, at the time excepted and still excepts to this order.

Scott Circuit Court, May Term, May 22<sup>nd</sup>, 1903.

COMMONWEALTH OF KENTUCKY }  
 vs. } Order.  
 CALEB POWERS.

It is ordered that a vacancy exists in the judge-ship as to the trial of this cause, and it further appearing that *that* the Commonwealth and the defendant Powers can not agree on a special judge herein, it is ordered that the clerk of this court certify the fact to the governor as to the existence of such vacancy, for such action on his part as he may deem proper.

Scott Circuit Court, August Special Term, Aug. 3<sup>rd</sup>, 1903.

Ordered by the court that the commission by the governor of Kentucky, issued to the special judge, J. E. Robbins, be recorded, which commission is as follows:—

487 In the name and by the authority of the Commonwealth of Kentucky, J. C. W. Beckham, governor of said Commonwealth, to all to whom these presents shall come, Greeting;

Whereas it has been made known to me by the certificate of the clerk of the circuit court of Scott county, that in the case in said court, wherein The Commonwealth of Kentucky is plaintiff and Caleb Powers is defendant, the regular judge of said court, for cause, cannot preside over said court and that the parties in interest cannot agree upon an attorney to try said cause,

Now know ye that by authority vested in me, by law, I do hereby appoint J. E. Robbins of Graves county, as special judge of said court to preside in the trial of the above named cause and I hereby invest him with full power and authority to execute and discharge the duties as such during the term prescribed.

In testimony whereof I have caused these letters to be made patent and the seal of the Commonwealth to be affixed.

Done at Frankfort, the 29<sup>th</sup> day of May, in the year of our Lord,

one thousand, nine hundred and three and in the one hundred and eleventh year of the Commonwealth.

J. C. W. BECKHAM.

By the governor:

C. B. HILL,

Secretary of State,

By ———,

Assistant Sec'y of State.

I, J. E. Robbins, do solemnly swear that I will support the Constitution of the United States and the constitution of this Commonwealth and be faithful and true to the Commonwealth of Kentucky, so long as I continue a citizen thereof, and that I will faithfully execute to the best of my ability the office of special judge for the circuit court for Scott county, Kentucky, according to law, and

488 I do further solemnly swear that since the adoption of the present constitution, I being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent nor accepted a challenge to fight a duel with deadly weapons nor have I acted as a second in carrying a challenge nor have I aided nor assisted any person thus offending, so help me God.

I, J. E. Robbins, do further solemnly swear, that I will administer justice without respect to persons and do equal right to the poor and to the rich and that I will faithfully and impartially discharge all the duties incumbent upon me as judge, according to the best of my abilities.

J. E. ROBBINS.

Subscribed and sworn to before me by J. E. Robbins, this 30<sup>th</sup> day of May, 1903.

C. W. WILSON,

Clerk Graves Circuit Court.

Filed June 17<sup>th</sup>, 1903.

T. J. PENN, C. S. C. C.,

By A. J. COFFEE, D. C.

It is also ordered that the order made in chambers calling a special term of the Scott circuit court be recorded, which order is as follows:—

"Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Order.
vs.	
CALEB POWERS, Defendant.	

Whereas it has been made known to the governor of this Commonwealth by the certificate of the clerk of the circuit court for Scott

489 county, that in the prosecution pending in said court, wherein the Commonwealth of Kentucky is plaintiff and Caleb Powers is defendant, the Hon. J. E. Cantrill, the regular judge of said court, for cause, cannot preside over said court at the trial of said prosecution and the parties in interest cannot agree upon an attorney to try said prosecution, and whereas the governor of Kentucky, on the 29<sup>th</sup> day of May, A. D., 1903, by virtue of the power vested in him by law, did appoint and commission the undersigned, J. E. Robbins, special judge, to attend and preside in the trial of said prosecution and whereas it doth appear to me to be necessary for said trial to be had at a special term on account of the many witnesses and the great length of time which it will probably require to complete said trial, now therefore I J. E. Robbins, special judge of the Scott circuit court to try said prosecution, do hereby appoint and fix Monday, the third day of Aug. 1903, the day on which I will open said special term of the Scott circuit court, for the trial of the prosecution aforesaid and the clerk of said court is directed to post this order and notice in a conspicuous place at the door of the court house of Scott county, at least ten days before the beginning of said special term, and said special term will continue until said prosecution shall be finally disposed — and the parties to said prosecution and their attorneys will observe this order and notice and govern themselves accordingly.

This the 16<sup>th</sup> day of June, 1903.

J. E. ROBBINS,  
Special Judge.

Filed June 17<sup>th</sup> 1903.

T. J. PENN, C. S. C. C.,  
By A. J. COFFEE, D. C.

490

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS. }

Deposition of Charles Finley, W. S. Taylor and W. J. Davidson, received by mail in good order and filed.

The depositions referred to in the foregoing order have been heretofore copied.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS. }

Came parties to this cause, the attorney for the Commonwealth announced ready for trial; the defendant asked until to-morrow morning at nine o'clock in which to prepare affidavits for a continuance, which time was granted by the court.

Scott Circuit Court, August Special Term, Aug. 4", 1903.

THE COMMONWEALTH OF KENTUCKY }  
   *vs.* } Order.  
 CALEB POWERS.

Came the defendant Caleb Powers and tendered and offered to file a plea in abatement and bar and an affidavit for continuance of the trial of said plea, and to the filing of said plea and affidavit the plaintiff objected, and the court being advised overrules the motion to file said plea and affidavit and directs that said plea and affidavit be marked tendered and offered to be filed, to which ruling of the court the defendant excepts.

491 Thereupon came defendant and filed his affidavit and moved the court to continue this cause on account of the absence of witnesses set forth in affidavit, and the attorney for the Commonwealth agreed that the statements in said affidavit may be read as the deposition of said witnesses as set forth in said affidavit except as to John S. Sweeney and William Sweeney, subject to competency and relevancy; the court thereupon over-ruled the motion for a continuance, to which the defendant excepted.

Clarence Walker was appointed by the court as official stenographer in this cause and thereupon took the oath of office according to law.

The plea in abatement and bar and affidavit for continuance and bill of exceptions No. 1 and the affidavit for continuance are as follows:

492                                Scott Circuit Court.

THE COMMONWEALTH OF KENTUCKY }  
   *vs.* } Plea in Abatement and Bar.  
 CALEB POWERS.

Comes the defendant Caleb Powers, and says that on the 10" day of March, 1900, he was pardoned of the crime with which he is charged in the indictment, herein, by William S. Taylor, who was then governor of Kentucky, and he refers to and pleads same in bar of further proceedings under said indictment. He says that at the annual election, held on the 7" day of November, 1899, the said William S. Taylor was a candidate and voted for, for the office of governor of Kentucky; that on the 9" day of December, 1899, the State board of election commissioners adjudged and certified, according to law, that the said William S. Taylor had received the highest number of votes cast for, and was elected to said office, of governor for the term prescribed by the constitution of Kentucky, and issued to said Taylor a certificate of election to said office; that on the 12"

day of December, 1899, the said Taylor qualified, as required by law, by taking the oath of office before the Honorable James H. Hazlerig, chief justice of the court of appeals of Kentucky was inaugurated governor of said State, and immediately entered upon the discharge of the duties of said office, and took possession of the executive offices and buildings provided by the State for the governor, and of all books, papers, and other archives pertaining to said office; that from the date of his qualification, on December 12<sup>th</sup>, 1899, until the 21<sup>st</sup> day of May, 1900, the said William S. Taylor was in continuous possession of said offices, buildings, papers, records and archives of government, and performed the duties and functions of said office, claiming at all times to be the governor of Kentucky, and to have the right and title to said office by reason of his said election thereto and the certificate thereof; that as such he was recognized by the secretary of state, the auditor of public accounts, the treasurer, the attorney general, and by all State officers and by the public, and defendant avers that he was the governor of Kentucky from the 12<sup>th</sup> day of December 1899, until the 21<sup>st</sup> day of May, 1900. Defendant further says that William Goebel was an opposing candidate for said office and that he contested the election thereto of said William S. Taylor; that J. C. W. Beckham was a candidate at said election for the office of lieutenant governor of Kentucky; and that he contested the election thereto of John Marshall; that said John Marshall was a candidate, and was voted for, for the office of lieutenant governor of Kentucky at said election, and that on the 9<sup>th</sup> day of December, 1899, the State board of election commissioners duly awarded and issued to said Marshall a certificate of election to said office as the candidate receiving the highest number of votes cast therefor, and that on the 12<sup>th</sup> day of December, following, the said Marshall qualified by taking the oath of office required by law, and at once entered upon the discharge of the duties of said office; that said Taylor and Marshall had been citizens of Kentucky for six years next before, and were thirty years of age at the time of their election to said offices and were duly qualified when elected to hold same. Defendant avers and charges that the said contests for the governorship and lieutenant governorship of Kentucky were never passed upon or determined by both houses of the General Assembly, as required by the constitution of said State and the laws enacted in conformity therewith; that subsequent to said election, said contestants had entered into an agreement with divers members of the legislature to set aside and nullify same by the institution of said contests before them, and that pursuant thereto the contest boards were fraudulently selected, not by lot as the law requires; that as a result of said fraudulent selection, ten of the eleven members of the board to try the governor's contest were partisans of the said contestant Goebel and nine of the eleven members of the board to try the lieutenant governor's contest were partisans of the said contestant Beckham, that a number of the members of both of said boards were

disqualified from sitting, because they had advised that said contests be made, and had promised to make them effective; that at least one member of the board selected to try the governor's contest had wagered money that the said contestant, Goebel, would be elected; that in the pretended trials of said contests, said boards had acted in an illegal and tyrannical manner in the admission and rejection of testimony and in all matters pertaining to the conduct of said trial. Defendant further says that said contest for the governorship was terminated by the death of the contestant William Goebel, on the 3<sup>rd</sup> day of February, 1900; that on January 31<sup>st</sup>, 1900, the said William S. Taylor, as governor of Kentucky, by proclamation of that date duly issued published and made known to the senators and representatives constituting the senate and house of representatives of the legislature of Kentucky, adjourned said legislature to meet in the city of London, Kentucky, on the 6<sup>th</sup> day of February, 1900, that from the time that said session of the legislature convened at Frankfort, on January 2<sup>nd</sup>, 1900, until the said adjournment by the governor, its session had been held in the state house in Frankfort, Kentucky, the seat of government, the senate in the senate chamber, and the house in the hall of the house of representatives in said state house; that there was no meeting of said  
495 said legislature, or of either house thereof, at London, Kentucky, or at the state house in Frankfort, from its adjournment by said proclamation on January 31<sup>st</sup>, 1900, until both houses reconvened at Frankfort on February 19<sup>th</sup>, 1900. Defendant avers and charges that from and after the 26<sup>th</sup> day of January, 1900, until the expiration by limitation of said session on March 13<sup>th</sup>, 1900, without fault upon the part of the public printer, the journals of each day's proceedings were not published, or placed upon the desks of the members of said houses, as required by law; that there are no originals of the journals of the proceedings of said legislature, or of either house thereof, and that none were ever prepared, or kept as the law requires; that the printed volumes published by, or for, the Commonwealth of Kentucky purporting to be copies of said journals, were not prepared or published by, or under the supervision of the clerks or assistant clerks of said bodies, and defendant avers and charges that said printed volumes were edited, printed and published by, or under the supervision of one G. Allison Holland, and that the said printed volumes were never approved by the said houses, or either of them, or by any one thereunto by law authorized in order to give same the sanction of verity; that all of these facts are shown in said journals in what purports to be a joint resolution of said houses, passed on March 13<sup>th</sup>, 1900, purporting to direct their publication as aforesaid, none having been printed daily, since January 26<sup>th</sup>, 1900; as aforesaid, that neither said printed volumes nor the daily proceedings in any form after Jan'y 26<sup>th</sup>, 1900, were so published until a period of more than sixty days after said final adjournment on March 13<sup>th</sup>, 1900. Defendant says that no journals were prepared by the clerks or assistant clerks of



said bodies, or kept, or published, daily, or at all, for the  
 496 dates of Jan'y 31", 1900, Feb'y 1 or 2", 1900; that on Jan'y  
 31", 1900, the day on which it is stated in said alleged printed  
 copies that — a joint session of said two houses William Goebel was  
 declared governor and J. C. W. Beckham lieutenant governor, there  
 was in fact, no meeting of said houses in joint session, and  
 no meeting of said houses in separate sessions, and no such  
 action, or any action taken on that day by either of said houses in  
 joint or separate session; that there was no meeting whatever of  
 either of said houses, or of the two jointly, had or held on Febru-  
 ary 1", 1900; that, if on January 31", 1900, or February 1", 1900,  
 there was an attempt by any member or members of either of said  
 bodies to have — to hold a meeting of said bodies, or either of them,  
 the same was not at the regular or customary place or places for  
 such meetings, was not pursuant to any adjournment, and was with-  
 out notice of the time or place thereof, to the members constituting  
 said bodies, respectively, or to the said contestees, William S. Tay-  
 lor and John Marshall, or either of them, or to the public and espe-  
 cially without any such notice to the following named duly elected  
 and qualified senators, viz: Geo. H. Alexander, John Barrett, Curtis  
 F. Burnham, Wm. H. Cox, C. H. Dye, J. C. Gillispie, Thos. H. Hayes,  
 T. M. Hill, N. T. Howard, J. P. Huff, B. S. Huntsman, J. J. John-  
 son, R. M. Jolly, T. S. Kirk, W. E. Miller, A. D. Roberts, R. S. Trip-  
 lett, V. M. White and J. L. Whitehead, or either of them, and divers  
 others, or to John Marshall, president of the senate; or to either of  
 the following duly elected and qualified members of the house of  
 representatives; viz: M. Abele, J. D. R. Aiken, J. W. Alexander, C. C.  
 Bagby, E. E. Barton, R. R. Benningfield, B. J. Bethurum, H. Brister,  
 M. M. Burkamp, J. W. Catron, R. O. Cochran, W. H. Collopy, James  
 Cooper, J. F. DeLong, W. U. Crider, W. H. Hall, L. W. Hampton,  
 W. T. Harris, J. P. Haswell, E. P. Hays, M. R. Heisman, John  
 497 T. Heisman, John T. Hinton, R. C. Jarragin, Isaac Johnson,  
 Jno. R. Kelday, W. T. Lafferty, J. E. Leslie, W. W. Lewis,  
 William Lewis, W. H. Lilly, B. H. Lott, J. A. Mchaffey, J. McDowell,  
 B. F. Meadows, Emmett Orr, W. S. Randolph, E. H. Read, Ben T.  
 Robinson, J. F. Rogers, J. P. Rose, R. W. Slack, R. H. Spurrier, J.  
 D. Strong, J. H. Sturgill, P. H. Taylor, C. W. Tipton, E. E. Trivett,  
 C. J. Walton, John M. Wilson, and R. M. Yarberry, and divers  
 others, and no one of the said named senators or representatives or  
 the president of the senate or the said contestees attended such al-  
 leged meeting or meetings, and that there was not a quorum of  
 the duly elected and qualified senators or representatives present  
 thereat. And because of said facts, the defendant avers and charges  
 that the pretended copies of the said alleged senate and house  
 journals, there being no originals, for the said dates of January 31",  
 1900, and February 1", 1900, as printed by, or for the Common-  
 wealth of Kentucky, which defendant is informed, believes and  
 charges were not kept, or published, or printed, daily, as required  
 by law, but have been edited, printed and published more than sixty

days since the termination of the session of said legislature on March 13<sup>th</sup>, 1900, purporting to show proceedings of sessions, or meetings of the houses of said legislature on said dates, which were never held, are false and fraudulent. Defendant says, as he is informed, that there was an attempted meeting of both houses of said legislature, in separate and joint sessions, in a room at the Capitol hotel in the city of Frankfort, Kentucky, which was not and had not been a regular or customary place of the meeting or sitting of either of said houses, on the afternoon of February 2<sup>nd</sup>, 1900, by a portion of the members of those bodies; but defendant avers and charges that the

498 said attempted meetings were held secretly, not pursuant to any adjournment, and without notice of the time or place thereof to the members constituting said bodies, or to the said contestees, William S. Taylor and John Marshall, or to the public, and especially without such notice to the following named duly elected and qualified senators, viz; Geo. H. Alexander, John Barrett, Curtis F. Burnham, Wm. H. Cox, C. H. Dye, J. C. Gillispie, Thos. H. Hays, T. M. Hill, N. T. Howard, J. P. Huff, B. S. Huntsman, R. M. Jolly, T. S. Kirk, J. H. McDonald, W. E. Miller, A. D. Roberts, F. M. White and J. L. Whitehead, or either of them, and divers others, or to John Marshall president of the senate, or to either of the following named duly elected and qualified representatives viz: J. D. Aiken, R. R. Benningfield, B. J. Bethurum, H. Brister, W. M. Burkamp, J. W. Catron, James Cooper, J. F. Delong, W. U. Frider, W. M. Hall, L. W. Hampton, W. T. Harris, J. P. Haswell, E. P. Hays, H. R. Heissman, Jno. T. Hinton, R. C. Jarnagin, Isaac Johnson, Jno. R. Kelday, J. E. Leslie, W. W. Lewis, William Lewis, W. H. Lillu, B. H. Lott, J. A. Mahaffey, J. McDowell, P. H. McRoberts, B. F. Meadows, Emmett Orr, W. S. Randolph, E. H. Read, Ben T. Robinson, J. F. Rogers, J. P. Rose, H. W. Slack, R. H. Spurrier, J. D. Strong, J. H. Stirgell, P. H. Taylor, C. W. Tipton, E. E. Trivell, S. L. Van Meter, C. J. Walton, John M. Wilson and M. R. Yarberry, and divers others; and that no one of said senators and representatives, and neither of said contestees was notified or present at said attempted meetings, of February 2<sup>nd</sup>, 1900, the day on which it is stated in said printed journals that William Goebel and J. C. W. Beckham were declared, respectfully, Governor and Lieutenant Governor of Kentucky; that on and after January 30<sup>th</sup>, 1900, there were one hundred duly elected and qualified representatives who constituted the house of representatives; and defendant avers and charges that at the November election 1899, T. M. Hill was a

499 candidate for, and was elected to, the office of senator for the 25<sup>th</sup> senatorial district of Kentucky, and a certificate of his said election was issued to him; as required by law, and that on or before the forenoon of January 31<sup>st</sup>, 1900, the said T. M. Hill duly qualified as senator, by taking the oath of office, and defendant says that, upon the qualification of said Hill, there were then and thereafter, until the death of William Goebel, thirty-eight duly elected and qualified senators, who constituted the senate of

the General Assembly of Kentucky, of whom it required not less than twenty to constitute a quorum, and that there was no quorum of the said senate present at the said attempted separate or joint sessions, or sittings, on February 2", 1900.

Defendant avers and charges that said William Goebel was not the governor of Kentucky on January 31", 1900, and never became such governor, and that William S. Taylor, invested with the full power and authority of said office on December 12", 1899, continued to be the governor of Kentucky until his abdication of that office on May 21", 1900. Further pleading, defendant says that on the 19" and 20" days of February 1900, after said legislative bodies had re-convened at the State house in Frankfort, Kentucky, the said printed journals report that both branches thereof, in joint and separate sessions, declared by resolution that the said William S. Taylor and John Marshall had been unseated as governor and lieutenant governor, and that said William Goebel and J. C. W. Beckham had been seated as governor and lieutenant governor, respectively, by the previous action of said bodies that no further action on said dates, or at any other time, subsequent to the alleged action of February 2", 1900, was taken by said bodies, or either of them, touching upon, or looking to the determination of said contests; that on said days

February 19" and 20", 1900, the reports of the boards appointed to hear and report upon said contests were not made to either of said bodies, in joint or separate session, as required by law that no notice was given to said Taylor or Marshall that the said contests would be then tried, or considered in any way; that no time was allowed for the consideration or discussion of said reports, or of the merits of said contests, and said Taylor and Marshall, or either of them, were not notified, were not heard in person, or by counsel, on either of said days, or at any time, before said bodies, or either of them, whether separately or jointly convened, which rights were accorded by the rules theretofore adopted by the said General Assembly for the trial and determination of said contests; that there are no originals of the journals as prepared, by the clerks, or assistant clerks, of said bodies, if so prepared, and the same were not published daily, or at all, for the said dates of February 19" and 20", 1900.

*Paragraph # 2.* Re-affirming the allegations of the foregoing paragraph, the same as if copied, herein, and re-asserting that William Goebel never became the governor of Kentucky and that William S. Taylor was elected, qualified, and served as governor of Kentucky from December 12", 1899, until May 21", 1900, defendant says; that there were filed and presented contests for the office of governor and lieutenant governor of Kentucky by the opposing candidates William Goebel and J. C. W. Beckham and that "both houses of the General Assembly" were by the constitution of Kentucky constituted the tribunals for determining such contests, "according to such regulations as may be (had been) established by law," that the regulations so established provided that the decision of the "contest board", or

501 committee should not be final or conclusive, but should be reported to the two houses of the General Assembly for the further action of the General Assembly, and that the General Assembly should determine the contests; that the law and rules adopted by said houses provided; "such report (of the contest board) when made shall be immediately taken up for consideration and discussion for a time of not exceeding six hours, one half of which shall be allotted to each side."

Defendant avers and charges that such regulations or rules of procedure were not followed; that no report of the contest board was made to the two houses of the General Assembly at any time; that no notice was given of the pretended trial or determination by such tribunal of said contests, or either of them; that no opportunity was given to either of the parties, contestees, then holding said offices, or to their counsel, or representatives, to be heard upon the questions involved; that the alleged sittings of said tribunals, if any there were, which is denied, for the dates of January 31<sup>st</sup>, 1900, February 1<sup>st</sup> or 2<sup>nd</sup> 1900, were secret; that the alleged proceedings of said houses, as entered in the pretended printed copies of the alleged journals for said dates were false and fraudulent; that there were no such meetings no such journals and no such action, in fact, taken as set out in said pretended printed copies of said alleged journals; that the reported action of said houses on February 19<sup>th</sup> & 20<sup>th</sup> 1900, did not lawfully determine said contests.

Defendant says that the prosecution of this case proceeds and is predicated upon the alleged action of the said houses of the General Assembly particularly, for the dates of January 31<sup>st</sup>, 1900, and February 2<sup>nd</sup>, 19<sup>th</sup> 20<sup>th</sup>, 1900, in the pretended trial and determination of said contests, and upon the pretended decision that said William

502 S. Taylor was not the governor of the State of Kentucky, and that his acts as such were without authority of law, and his grant to defendant of executive pardon for the crime with which defendant is charged, herein, is of no legal effect and void and that because of such pretended trial and determination of said contests, the defendant is amenable to the law under the indictment herein. Defendant says that the alleged actions of said houses of the General Assembly were taken without due process of law and without the notice or knowledge of the said Taylor, or Marshall, or this defendant, and deprives defendant of his liberty without due process of law, and deprives the defendant of the equal protection of the law, all of which is contrary to and prohibited by amendment XIV of the Constitution of the United States, which provides that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Defendant further says that the facts in support of this plea with regard to the pretended legislative trial and determination of said contests have come to his knowledge since the plea of pardon was made at his last trial under said indict-

ment, and he now comes and offers to prove all material averments of fact, herein in support thereof.

Wherefore, defendant prays that his pardon by William S. Taylor, on March 10<sup>th</sup>, 1900, be recognized as the act of the governor of Kentucky, and that he stand acquit of the crime charged in the indictment herein and go hence without day.

H. O. HOWARD,  
Of Counsel for Defendant.

503-517 STATE OF KENTUCKY, }  
County of Scott, } act:

The defendant Caleb Powers says that the statements of the foregoing plea are true to the best of his knowledge and belief.

CALEB POWERS.

Subscribed and sworn to by Caleb Powers, before me, this — day of August, 1903.

L. F. SINCLAIR,  
Ex., Scott County, Kentucky.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. } Bill of Exceptions No. 1.  
CALEB POWERS, Defendant.

Be it remembered that the defendant Caleb Powers by his attorneys, moved the court to permit him to file a plea in writing designated a "plea in abatement and bar marked A" and at the time announced that the defendant would not be ready for a trial of the said plea and then tendered the affidavit of the defendant for a continuance of the trial of the said plea of abatement marked "B." The Commonwealth objected to the filing of said plea and thereupon said plea and the affidavit for the continuance of the trial of the said plea were endorsed by the clerk — tendered.

The said plea and affidavit are in words and figures as follows:— (Heretofore copied by the clerk).

The court upon consideration of the filing of said plea sustained the objection of the Commonwealth and rejected said plea and refused to permit the defendant to file the same, to which ruling of the court the defendant excepted and still excepts and thereupon tendered this his bill of exceptions, which is now signed, sealed and made a part of the record of this case.

J. E. ROBBINS, Judge.

519-543

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Bill of Exceptions No. 2.
vs.	
CALEB POWERS, Defendant.	

Immediately after the court had directed the special venire from Bourbon county, the defendant by counsel moved the court that a jury selected to try the defendant be composed of six Republicans and six Democrats. The Commonwealth objected and the court sustained the objection and refused the motion holding that under the law such an arbitrary division of the jury was impracticable and unwarranted under the law. To which ruling of the court the defendant excepted.

Thereupon the defendant moved the court to admonish the officers directed to summon the special venire to select jurors without reference to their party affiliations. The Commonwealth objected and overruled the motion stating at the time he had already defined to the officers and character of jurors qualified under the law for jury service and to be summoned and he had no reason to assume the officers would not perform their duty.

To which ruling of the court the defendant excepted and still excepts.

J. E. ROBBINS, Judge.

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COMMONWEALTH OF KENTUCKY	}
vs.	
CALEB POWERS.	

This case having been twice tried in this court, and the last jury having been obtained from the adjoining county and the court being satisfied that a jury cannot be obtained in Scott county, the sheriff is ordered to go to Bourbon county and summon two hundred men possessing the statutory qualifications for petit jurors and he will have one hundred of said men in court to-morrow morning at eleven o'clock and one hundred at 11 o'clock a. m. on Thursday Aug. 6".

Came defendant and filed proof of exceptions No. 2 duly signed by the judge.

Scott Circuit Court, August Special Term, Aug. 5", 1903.

COMMONWEALTH OF KENTUCKY	}
vs.	
CALEB POWERS.	

Came the parties to this cause. The work of selecting a jury was begun and the following were duly qualified as jurors:—J. C. How-



ard, Albert Mitchell, Tom Paggett, J. T. Hazelwood, J. W. Doty, Geo. Estes, G. W. Faulkner, Clay Estes, L. W. Hagan, J. H. Wilson, W. S. Williams, Geo. Wyatt, but not having time to complete the selection of the jury this evening, the jurors qualified were given the usual admonition of the court and placed in the custody of the sheriff of Scott county, who was duly sworn to keep them together during the adjournment of the court.

545 Scott Circuit Court, August Special Term, Aug. 6<sup>th</sup>, 1903.

COMMONWEALTH OF KENTUCKY }  
 vs. } Order.  
 CALEB POWERS.

Came the defendant and filed written motion, which motion is as follows, to-wit:—

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Motion.  
 CALEB POWERS, Defendant.

The defendant, Caleb Powers, now comes and enters this challenge to the panel of jurors and each juror, tendered him and moves that said panel and each juror thereof and the special venire summoned from Bourbon county be discharged upon the following grounds, to-wit; that the officers of this court directed to summon a special venire from Bourbon county by order of this court entered in this cause, Aug. 5<sup>th</sup>, 1903, and who were sent by the sheriff of this county, to perform said service did not impartially perform their duties and have not fairly and impartially selected said jurors but upon the contrary did illegally and in violation of the statutes and constitution of this Commonwealth and in violation secured to this defendant as a citizen of Kentucky, and as a citizen of the United States, under and by virtue of the Constitution of the United States, and particularly in violation of the rights secured to him by the 14<sup>th</sup> amendment of the Constitution of the United States, select and summon said jurors and the said officers did consciously and purposely select jurors of a different affiliation from the political affiliation of the defendant and this they did with the purpose of discriminating against the rights of the defendant, and with the intention to deprive the defendant who is a citizen of Kentucky, and of the United States of the rights to a fair and impartial trial by a jury impartially selected, as required by the laws and constitution of Kentucky and the Constitution of the United States and the amendments thereto.

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The defendant further moves the court for the reason and upon the ground hereinbefore stated and set forth to require the sheriff to

designate other officers than those by him directed to summon the special venire aforesaid, to summon petit jurors for the trial of this cause, and that such persons so designated for such service receive all proper admonitions and instructions from this court in respect to the performance of their duties, and if the court be unable to grant this motion as indicated, the defendant for the reasons and grounds stated, moves the court to designate some other officer or person than the sheriff to summon jurors in this cause.

The defendant tenders herewith his affidavit.

And in support of said motion filed the affidavit of defendant and Thomas C. Whaley, and in opposition to said motion the Commonwealth filed the joint affidavits of Wm. Rogers and James Burk and the joint affidavit of Z. D. Lusby and Joseph Williams.

Thereupon the court over-ruled the motion without any reference to said affidavits and the court holds that it is not claimed in the grounds of said motion that said jurors are not sensible discreet and sober men, and house-keepers of Bourbon county, over the age of twenty one years, to all of which the defendant excepts.

547 The affidavit of defendant referred to, and Thomas C. Whaley and the counter affidavits of Wm. Rogers and James Burk and the joint affidavit of Z. D. Lusby and Joseph Williams, in the foregoing order are as follows:—

548 Scott Circuit Court.

COMMONWEALTH OF KENTUCKY,	} Affidavit of Caleb Powers in Sup-	
Plaintiff,		port of the Motion to Dis-
vs.		charge the Panel and Special
CALEB POWERS, Defendant.	} Venire.	

The affiant, Caleb Powers, states that in the campaign of 1899 that the late William Goebel was the Democratic candidate for governor and that W. S. Taylor was the Republican candidate for the same office.

Affiant says that he was the Republican candidate for sec'y of state; that said Taylor was awarded the certificate of election to the office of governor of Kentucky and this affiant was awarded the certificate of election to the office of sec'y of state as were the various other candidates on the Republican ticket.

Affiant further states that said campaign was a noted one for the bitterness and prejudice and passion aroused among the followers of the said William Goebel. He says that after the certificates of election was awarded to this affiant and his associates on the Republican ticket that a contest was instituted by the said William Goebel for the office of governor, before the legislature of Kentucky, the other Democratic candidates for the minor offices having filed contests also. He says that the feeling of bitterness aroused during

said campaign never abated and was intensified and increased during the pendency of said contest. He says the said William Goebel was assassinated while the said contests were pending that afterwards this affiant was indicted as an accessory before the fact to the murder of said Goebel. He says that the murder of said William Goebel deeply aggravated the passions and prejudices of his (Goebel's) followers and that this passion and prejudice still pervades the  
549 minds of the followers, adherents and admirers of said Goebel.

He states that he is informed and believes and charges that William Rogers and Z. D. Lusby, the deputy sheriffs of Scott county, Kentucky, who summoned the special venire from Bourbon county, Kentucky, now in attendance on this court, are both the partisan adherents and admirers of the said Goebel and the said Rogers and Lusby before summoning any of said venire entered into a consultation with Jim Burk, a deputy sheriff of Bourbon county, Kentucky, and Joe Williams, a constable of Bourbon county, Kentucky; that said Burk and Williams are Democrats and the partisan adherents and admirers of said Goebel. He says that after a conference with said Burk and Williams they accompanied said Rogers and Lusby while said veniremen were being summoned and that competent, qualified jurors were passed and not summoned by said Rogers and Lusby through and by the aid and counsel of said Burk and Williams simply because of their (the jurors) political affiliations, with the result that out of the list of ninety-five persons summoned on the special venire there were only two Republicans among them. He says that he is informed, believes and charges that through a systematic process of elimination for political reasons that said Rogers and Lusby or one of them, accompanied by Burk and Williams or one of them, purposely passed and failed to summon James Powers, then summoned Jno. Cain and then purposely failed to summon Dan Isgrigg, George Leeds, Porter Jett, Thomas Whaley, all of whom were Republicans and Dr. J. T. McMillan, Independant Democrat, all of whom were competent and qualified for jury service and residing in the city of Paris and on the Millersburg pike and summoned only Walkter Clark, Ed Burk, Dennis Handley, Caswell Goff,  
550 Democrats and adherents and admirers of the late William Goebel. He says that the aforementioned Republicans and Democrats reside in said city or on said road where the aforementioned Democrats reside who were summoned as jurors.

He says that on the Maysville and Lexington and Clintonville pikes that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, passed Henry Powers, Independent Democrat, George Pepper, W. P. Fox, C. T. Trhockmorton, George Taylor, George Jones, H. C. Weathers, Letcher Weathers Republicans and all of whom were competent and qualified jurors, and summoned only Ben Wood, John W. Thompson, B. F. Hazelwood, John F. Clark, W. F. Heathman, J. F. McDonald, Leslie Haggin, Geo. W. Allison, J. W. Mui, J. M. Craig, Ed Turner, all of whom

are Democrats and adherents and admirers of the late William Goebel and that the aforementioned Republicans reside on that part of said Maysville and Lexington and Clintonville pikes where the aforementioned Democrats reside that were summoned. He says that on the Jackstown pike the said Rogers and Lusby or one of them accompanied by said Burk and Williams or one of them, passed and purposely failed to summon A. J. Gorey, Lee Devers, Joe Booth, who were Republicans and competent and qualified jurors and summoned only George Redmond, Bedford Devers, Albert Mitchell, Wm. Neil and Rob't Collins, Democrats and adherents and admirers of the late William Goebel. He says that the aforementioned Republicans reside on that part of said Jackson pike whereon the aforesaid Democrats reside that were summoned.

He says that on the North Middletown and Flatrock turnpikes that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, passed W. C. Massie, C. J. Daniel and — Burnes all of whom are Republicans and competent and qualified jurors and summoned G. W. Wyatt, John J. Redmond,  
 551 R. E. Letton, M. J. Glenn, Democrats and adherents and admirers of the late William Goebel. He says that the aforementioned Republicans reside on that part of the North Middletown and Flatrock turnpikes where the aforementioned Democrats reside that were summoned.

He states that in the town of Ruddles Mills and on the Millersburg and Ruddles Mill pike that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, passed John Hamilton, Independent Democrat, Wm. Cherry, and C. L. Hough, Republicans, all of whom are competent and qualified jurors and summoned Thomas Currant, James Fisher, Mort Rankins, Tom Paggett, Geo. Falconer, S. R. Oliver, John W. Conway, Nath Goodman, Democrats, adherents and partizans of the late William Goebel. He says that the aforesaid Republicans reside in said town of Ruddles Mill turnpike where the aforementioned Democrats reside that were summoned.

He states that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, in the vicinity of Clay's cross-roads and the territory included by the Clay and Kiser pikes and the Georgetown and Cynthiana pikes, passed and purposely failed to summon J. M. Hughes, J. Miller Ward, Catsby Woodford, John B. Kennedy, Frank P. Clay Sr., Frank P. Clay Jr., O. P. Clay, Quincy Ward, Col. E. F. Clay, E. F. Clay Jr., Jos. H. Ewalt, Independent Democrats, and Henry Clay, Lan Hume, Morin Moore, Spears Moore, Republicans, competent and qualified jurors and summoned A. P. Adair, Alfred Batterton, John C. Morris, Democrats and adherents and admirers of the late William Goebel.

He further says that in summoning jurors in Paris, Kentucky, that the same method of selecting only the adherents and admirers of the late William Goebel were observed by said Rogers and  
 552 Lusby or one of them, and that said Burk and Williams would introduce said Rogers and Lusby to those persons only

that were Democrats, known so to be to them and the partisan adherents and admirers of the late William Goebel and such only were introduced. He states further that he is informed, believes and charges that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, summoned three jurors in the presence of one, Wyatt Thompson, on the streets of Paris, Kentucky, while said Thompson was talking to said Rogers and Lusby and Burk and Williams that the three jurors summoned were Democrats and admirers and adherents of the late William Goebel and that the said Wyatt Thompson was a Republican, known so to be, and was not summoned on said jury because of this fact.

The affiant says that while the charge preferred against him in the indictment herein is one of murder, notwithstanding this fact, he submits to the court whether it is possible for him to secure or have that kind of trial before a jury impartially indicted, which is guaranteed to him under the laws of the State of Kentucky and the Constitution of the United States should the jury be selected by officers who select only those persons for jury service who are the political adherents and admirers and followers of the late William Goebel whom this affiant is accused of having aided and abetted the murder thereof.

The affiant further states that he is a citizen of the State of Kentucky and a citizen of the United States.

CALEB POWERS.

Subscribed and sworn to before me by Caleb Powers, this the 6<sup>th</sup> day of August, 1903.

L. F. SINCLAIR,  
Ex., Scott County, Kentucky.

553

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} The Affidavit of Thomas Whaley in Support of the Motion to Dis- charge the Special Venire.
vs.	
CALEB POWERS, Defendant.	

The affiant, Thomas C. Whaley states that he is citizen and resident of Bourbon county, Kentucky, and has resided therein all his life and is intimately acquainted with the citizens of said county; the turnpike roads that are located in said county and the population residing on said turnpikes.

He states that he has examined the list of the special venire summoned by Will Rogers, deputy sheriff of Scott county, Kentucky, and Z. D. Lusby, deputy sheriff of Scott county, Kentucky, and that there are ninety five names among the special venire and are as follows :

J. S. Munson,	F. P. White	M. J. Glenn
George W. Allison	W. E. Stilwell	A. B. Denees.
George Thompson	Wm. Doty	G. W. Redmon
Ed. Turner	George Wyatt	H. D. Campbell
Chas. W. Penn	Clark Bennett	R. L. Collins
J. M. Craig	Newton Current	Clay Estis
S. D. Thompson	Dennis Hauly	Wm. Neal
John W. Thompson	Haror Miller	Albert Mitchell
B. F. Hazelwood	Junius Bolson	Frank Clay
John Ba	Walter Clark	L. T. Beal
Frank Hazelwood	Jessir Berry	S. J. Kennedy
C. N. Hostetter	John Cain	Chas. Barnett
John F. Clark,	J. Walker Muir	Malcom Boswell
W. F. Heathman	B. B. Wood	Chas. Stevens
G. Fry	L. J. Mitchell	A. T. Wright
J. F. McDonald	Tom Redmon	Varden Slipp
Leslie Hagan	Chas. Wilson	Jim Fisher
Robert Stipp	Tom Estes	Thos. Currant

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L. D. Harris	H. C. Roberts	Mote Rankins
Cass Goff	George Tate	Jack Cunningham
Ed Burk	Jack Higgins	Woodson Browning
John Endicott	John Daughety	Berry Bedford
Audie Riffitt	George Pendicord	R. O. Turner
J. C. Morris	Tom Paggett	John Johnson
Alfred Batterton	Math Goodman	F. B. Thomas
A. P. Adair	Newel Snapp	D. T. Wilson
Geo. Estes	Geo. Faulkner	Steel Mars.
Scott Williams	Frank Shanks	E. T. Keller
Jeff Kiser	John Conway	J. H. Haggard
Joel Howard	James Earlywein	Lloyd Ashurst
R. E. Letton	S. P. Oliver	W. A. Hill Jr.
John Wilson	Ora Jones	

And out of the entire list of names summoned as above set out there appears only the names of two Republicans. The remaining ninety three veniremen are all Democrats.

Affiant further says that the aforesaid deputy sheriffs, Will Rogers and Z. D. Lusby were accompanied when they summoned said special venire by Jim Burk, deputy sheriff of Bourbon count- Kentucky, and Joe Williams, constable of Bourbon county, Kentucky, that said Burk is an ardent Democrat and supporter of the late William Goebel as is said Joe Williams.

The affiant further says that in summoning the said special venire that in the city of Paris and on the Millersburg pike said Lusby and Rogers or one of them, accompanied by said Burk and Williams or one of them passed and failed to summon Jas. Powers, then summoned Jno. Cain and then purposely failed to summon Dan. Isgrigg,



George Leeds, Porter Jett, Thos. Whaley all of whom were Republicans and Dr. J. T. McMillan, Independent Democrat, who were qualified for jury service and summoned Walter Clark, Ed. 555 Burt, Dennis Handley, Caswell Goff; Democrats and adherents and admirers of the late William Goebel. He says that the above named Republicans that were passed by, by said sheriff, were all competent and qualified jurors and that they lived in said city and on said turnpike roadside where the aforesaid Democrats reside.

He says that on the Maysville and Lexington and Clintonville pikes that said Rogers and Lusby or one of them accompanied by said Burk and Williams or one of them passed Henry Powers, Independent Democrat and Geo. Pepper, W. P. Fox, C. T. Throckmorton, Geo. Taylor, Geo. Jones, H. C. Weathers, Letcher Weathers, Republican and summoned Ben Woods, John W. Thompson, B. F. Hazelwood, Frank Hazelwood, John F. Clark, W. F. Heathman, J. F. McDonald, Leslie Haggin, Geo. W. Allison, J. W. Mutt, J. M. Craig, and Ed Turner all of whom are Democrats and adherents and admirers of the late William Goebel. He says that each of the above mentioned Republicans are competent and qualified jurors and that they reside along that portion of the said Maysville and Lexington and Clintonville turnpikes on which the aforesaid Democrats reside that were summoned.

He states that on the Jackstown pike that said Rogers and Lusby or one of them accompanied by said Burk and Williams or one of them passed and purposely failed to summon A. J. Gorey, Lee Devers, Albert Mitchell, William Neil, and Rob't Collins, Democrats and adherents and admirers of the late William Goebel.

He states that each of the aforesaid Republicans passed on said Jackstown pike are competent and qualified jurors; that they reside on that portion of said road where said Democrats reside.

He says that on the North Middletown and Flatrock turnpikes that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, passed W. C. Massie, 556 Daniel and — Buras, all of whom are Republicans and competent and qualified jurors and summoned G. W. Wyatt, John J. Redmond, R. E. Letton and M. J. Glenn, Democrats and adherents and partisans of the late William Goebel. He says that the aforementioned Republicans reside on that part of the North Middletown and Flatrock turnpikes that the aforementioned Democrats reside on.

He states that in the town of Ruddels Mills and on the Millersburg and Ruddels Mills pike that said Rogers and Lusby or one of them, accompanied by said Burk and Williams or one of them, passed John Hamilton, Independent Democrat, William Cherry, and C. L. Hough, Republicans, all of whom are competent and qualified jurors and summoned Thomas Current, James Fisher, Mort Rankins, Tom Paggett, Geo. Falconer, S. R. Oliver, John W. Conway and Nath. Goodman, Democrats, and adherents and parti-

sans of the late William Goebel. He says that the aforesaid Republicans reside in said town of Ruddels Mills and on that portion of the Millersburg and Ruddels Mills turnpike roadside where the aforesaid Democrats that were summoned reside.

He says that said Rogers and Lusby or one of them accompanied by said Burk and Williams or one of them in the vicinity of Clay's cross roads and the territory included by the Clay and Kiser pike and the Georgetown and Cyathiana pikes, they passed and purposely failed to summon J. M. Hughes, J. Miller Ward, Catsby Woodford, John B. Kennedy, Frank P. Clay, Sr., Frank P. Clay, Jr., O. P. Clay, Quincy Ward, Col. E. P. Clay, E. F. Clay Jr., Jos. H. Ewalt, Independent Democrats, and Henry Clay, Lan Hume, Morin Moore, Spears Moore, Republicans, and summoned A. P. Adair, Alfred Batterton, Jno C. Morrin Democrats and adherents and partisans of the late William Goebel.

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THOS. C. WHALEY.

Subscribed and sworn to before me this 5<sup>th</sup> day of Aug. 1903.

L. F. SINCLAIR,  
Ex. Scott County, Kentucky.

558

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY } Affidavit of William Rogers and  
vs. } James Burke.  
CALEB POWERS.

The affiant William Rogers says that he is a citizen and resident and deputy sheriff of Scott county, Kentucky. The affiant James Burke states he is a citizen and resident and deputy sheriff of Bourbon county, Kentucky. Said affiants state that as such officers they were together in the county of Bourbon when Deputy Sheriff Rogers of Scott county summoned part of the venire from which to select the jury in this case; and that said Rogers summoned the following named persons in the presence of said Burke with the exception of Clark Barnett, Newton Current, Dennis Handley, Horace Miller, Junius Bolson and D. T. Wilson which last named persons were summoned by said Rogers without the presence of said Burke:

J. S. Munson	George S. Allison	George Thompson
Ed Turner	Chas W. Penn	J. M. Craig
B. D. Thompson	John W. Thompson	B. F. Hazelwood
John Bounds	Frank Hazelwood	C. N. Hostetter
John F. Clark	W. F. Heathman	G. Frye
J. F. McDonald	Leslie Hagan	F. P. White
W. E. Stillwell	William Doty	George Wyatt
Clark Bennett	Newton Current	Dennis Handley
Horace Miller	Junius Bolson	Walter Clark

Jesse Berry,  
B. B. White,  
R. E. Letton  
G. W. Redmon  
Clark Estes  
Frank Clay

John Cane  
L. J. Mitchell  
M. J. Glenn  
H. D. Campbell  
William Neal  
F. B. Thomas

J. Walker Muir  
Tom Redmon  
A. B. Devers  
R. L. Collins  
Albert Mitchell  
D. T. Wilson

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Steele Marsh  
Lloyd Ashurst

E. T. Keller  
W. A. Hill, Jr.

J. H. Haggard,

They say that each and all of the above named persons are sober, discreet and intelligent housekeepers of Bourbon county and qualified under the law for jury service as affiants believed.

They say that it is not true that through and by the aid and counsel of said Burke or by the aid and counsel of any one else or at all, said Rogers passed by and did not summon any man simply because of that man's political affiliations. They say that it is not true that said Rogers through a systematic process of elimination for political reasons or otherwise purposely passed or failed to summon any man who was, as he was informed or believed, qualified for jury service and they further state that many of the persons designated in the affidavit of defendant herein as being summoned on certain roads and pikes, were, as a matter of fact actually summoned in the city of Paris where the said deputy sheriff found them.

They further state that many of the persons mentioned in the affidavit of the defendant in this case as being passed by the deputy sheriff were persons as the affiants understood and believed who were not qualified for jury service, some of them being United States revenue officials, others being old and infirm and some being practicing physicians and engaged in other occupations which disqualified them from jury service.

They say that it is not true that — either of the roads of Bourbon county or in the city of Paris as mentioned in the affidavits of the defendant Caleb Powers and Thomas Whaley said Burke would introduce said Rogers to those persons only that were Democrats, and adherents and admirers of the late William Goebel or that  
560 such only were summoned.

They further state that the politics of a large number of the persons summoned by said deputy sheriff was unknown either to said deputy sheriff Rogers or to said Burke.

They further state that the Wyatt Thompson mentioned in the affidavit of the defendant filed herein as they are informed, is not a housekeeper of the county of Bourbon but that he was simply in the city of Paris on a visit from the State of Indiana where he had been for some months and that he had not been in the city of Paris or county of Bourbon as much as two months in the last two or three years, but that his time had been spent in Texas and Indiana and that he was only in Bourbon county for a temporary purpose.

They say that it is untrue that out of the entire list summoned as set forth in the affidavits filed by the defendant herein which contain ninety six names, there only appear the names of two Republicans, but that of the 1.3 of names given in those affidavits as summoned by Rogers which contain only fifty five of the above ninety six named, more than two are Republicans and that there is a number of Prohibition-s and Republicans and Independent Democrats.

They further say that their information is that of the persons in Bourbon county qualified for jury service, a large per cent. is Democratic, to-wit:—at least ninety per cent. thereof and that many of the Republicans in said county that would be otherwise competent as jurors are in the service of the United States Government as store-keepers, *guagers*, rural route mail carriers, post office and other employment.

These affiants say that said Rogers in summoning the veniremen mentioned in this affidavit as summoned by him, conscientiously and honestly discharged his duty as a deputy sheriff of Scott county and without any desire or purpose to injure or prejudice the  
561 rights of the defendant Caleb Powers.

These affiants say that most of the venire-men summoned, were summoned in the night time, a part of which time a severe storm was raging; that as to a number of the persons mentioned in the affidavits filed by defendant as having been passed by; they visited their houses and endeavored to secure entrance so that they might be summoned for jury service but their endeavors to secure entrance met with no response.

They say further that a number of the persons named in the affidavits filed by the defendant Caleb Powers as being Republicans and Independent Democrats and as not summoned on that account, are not in fact Republicans and Independent Democrats but are and have been life long Democrats.

Affiant say the statements of this affidavit are true as they believe.

WILLIAM ROGERS.  
JAMES BURKE.

Subscribed and sworn to before me by William Rogers and James Burke this 6<sup>th</sup> day of August, 1903.

JAMES BRADLEY,  
Notary Public, Scott County, Kentucky.

My commission expires February 15<sup>th</sup>, 1906.

COMMONWEALTH OF KENTUCKY } Affidavit of Z. D. Lusby and Joseph  
 vs. } Williams.  
 CALEB POWERS.

The affiant, Z. D. Lusby says that he is a citizen and resident and deputy sheriff of Scott county, Kentucky. The affiant Joseph Williams states he is a citizen and resident and constable of Bourbon county, Kentucky.

Said affiants state that as such officers they were together in the county of Bourbon when Deputy Sheriff Lusby of Scott county summoned part of the venire from which to select the jury in this case; and that said Lusby summoned the following named persons:—

Dennis Handley	L. T. Beall	S. J. Kennedy
Charles Barnett	Malcolm Boswell	Charles Stevenson
A. T. Wright,	Vaden Shipp	James Earlywine
Robert Stipp	L. D. Harris,	Cass Goff
Ed Burke	John Endicott	Andy Reffett
J. C. Morris	Alfred Batterton	A. P. Adair
George Estes	Scott Williams	Jeff Keiser
Jule Howard	John Wilson	Charles Wilson
Tom Estes	H. C. Roberts	George Tate
Jack Higgins	John Doty	George Peddicord
Tom Paggett,	Nath Goodman	Newel Snapp
George Falconer	Frank Shanks	John Conway
S. P. Oliver	Ora Jones	Jim Fisher
Thomas Current	Mote Rankins	Jack Cunningham
Berry Bedford	R. O. Turner and	John Johnson.

They say that each and all of the above named persons are sober, discreet and intelligent housekeepers of Bourbon county and qualified under the law for jury service as affiants believed.

563 They say that it is not true that through and by the aid and counsel of said Williams or by the aid and counsel of anyone else or at all, said Lusby passed by and did not summon any man simply because of that man's political affiliations. They say that it is not true that said Lusby through a systematic process of elimination for political reasons or otherwise purposely passed or failed to summon any man who was, as he was informed or believed, qualified for jury service and they state further that many of the persons designated in the affidavit of defendant herein as being summoned on certain roads and pikes, were, as a matter of fact actually summoned in the city of Paris where the said deputy sheriff found them.

They further state that many of the persons mentioned in the affidavit of the defendant in this case as being passed by the said deputy sheriff were persons as the affiants understood who were not

qualified for jury service, some of them being United States revenue officials, others being old and infirm and some being practicing physicians and engaged in other occupations which disqualified them from jury service.

They say that it is not true that either on the roads of Bourbon county or in the city of Paris as mentioned in the affidavits of the defendant Caleb Powers and Thomas Whaley said Williams would introduce said Lusby to those persons only that were Democrats and adherents and admirers of the late William Goebel or that such only were summoned.

They further state *the* the politics of a large number of the persons summoned by said deputy sheriff was unknown either to said Deputy Sheriff Lusby or to said Williams.

They further state that the Wyatt Thompson mentioned in the affidavit of the defendant filed herein as they are informed, is not a housekeeper of the county of Bourbon but that he was simply  
 564 in the city of Paris on a visit from the State of Indiana where he had been for some months and that he had not been in the city of Paris or county or Bourbon as much as two months in the last two or three years, but that his time had been spent in Texas and Indiana and that he was only in Bourbon county for a temporary purpose.

They say that it is untrue that out of the entire list summoned as set out in the affidavits filed by the defendant herein which contain ninety six names, there only appear the names of two Republicans, but that of the list of names given in those affidavits as summoned by Lusby which contains only forty five of the above ninety six names, more than two are Republicans and that there is a number of Prohibition-Republicans and Independent Democrats.

They further say that their information is that of the persons in Bourbon county qualified for jury service, a large per cent. is Democratic, to-wit:—at least ninety per cent. thereof and that many of the Republicans in said county that would be otherwise competent as jurors are in the service of the United States Government as store-keepers, *guagers*, rural route mail carriers, post office and other employment.

These affiants say that said Lusby in summoning the veniremen mentioned in defendant's affidavit as summoned by him, conscientiously and honestly discharged his duty as a deputy sheriff of Scott county and without any desire or purpose to injure or prejudice the rights of the defendant Caleb Powers.

These affiants say that most of the venire-men summoned, were summoned in the night time, a part of which time a severe storm was raging; that as to a number of the persons mentioned in said affidavits as having been passed by, they visited their houses and endeavored to secure entrance so that they might be sum-  
 565 moned for jury service but their endeavors to secure entrance met with no response.

They further say that a number of the persons named in the affi-



davits filed by the defendant Caleb Powers as being Republicans and Independent Democrats and as not summoned on that account are not in fact Republicans and Independent Democrats but are and have been lift long Democrats.

Affiant- say the statements of this affidavit are true as they believe.

Z. D. LUSBY.

JOSEPH WILLIAMS.

Subscribed and sworn to before me by Z. D. Lusby and Joseph Williams this 6<sup>th</sup> day of August, 1903.

JAMES BRADLEY,  
Notary Public, Scott County.

My commission expires February 15<sup>th</sup>, 1906.

566

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. }

Came again the parties to this trial: The work of selecting the jury was again resumed and the following were duly qualified as jurors, to-wit, Albert Mitchell, George Estes, Clay Estes, J. H. Wilson, George Wyatt, Dennis Handley, J. C. Booth, Wm. Ryan, Ed Ingles, J. T. Hill, E. V. Lawson, Perry Rice, but not having been sworn to try the cause the jurors were given the usual admonition of the court and placed in the custody of the sheriff of Scott county, who was duly sworn to keep them together during the adjournment of the court.

COMMONWEALTH OF KENTUCKY }  
vs.  
CALEB POWERS. } Order.

Came the defendant Caleb Powers and filed his written motion to discharge the second venire of jurors summoned herein and in support thereof tendered and filed his own affidavit and the affidavit of R. B. Bolden, to which motion the Commonwealth objected and filed counter affidavit of Z. D. Lusby, Wm. Rogers, James Gibson, E. P. Clark, James Williams and James Burke, and the court being sufficiently advised over-ruled said motion, to which the defendant excepted.

The affidavits of Caleb Powers and R. B. Bolden and counter affidavit of Z. D. Lusby, Wm. Rogers, James Gibson, E. P. Clark, James Williams and James Burke referred to in the foregoing order are as follows:

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Motion.  
 CALEB POWERS, Defendant }

The defendant Caleb Powers now comes and moves the court to discharge the second special venire which has been selected and summoned from Bourbon county pursuant to an order of this court, and the members of which have this day appeared and reported for duty in this court. And he moves the court to discharge each and all of the men composing said venire upon the following grounds.

The defendant charges that said venire and the citizens composing same have not been fairly and impartially selected by the officers charged with the duty of selecting and summoning said venire; that all of the men composing said venire, with one exception, are members of the Democratic party and warm friends and admirers of the late William Goebel and that they were his ardent partisans and active supporters and each and all of them were summoned on account of political hostility to this affiant. The defendant states that the fact that said venire was composed of Democrats, with only one exception, was not a result of accident or chance or of inadvertence on the part of the officers who summoned said venire but that such result was caused by the constant purpose and effort on the part of said officers to select and summon only such citizens of Bourbon county as were members of the Democratic party and personal and political friends of the late William Goebel and he charges that but for such unlawful discrimination on the part of said officers in selecting and summoning said venire, a large portion thereof should have been and would have been composed of citizens of said county possessing all the necessary qualifications for jury service, who are members of the Republican party, the party which this defendant has been and is now identified and in support of his motion to discharge said venire the defendant files his affidavit herein.

CALEB POWERS,

By his Att'ys, J. R. MORTON AND OTHERS.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit.  
 CALEB POWERS, Defendant }

Affiant, Caleb Powers, defendant herein, states that of the second venire summoned for jury service in this action, who have this day, Thursday Aug. 6", 1903, appeared in court, eighty are members of

the Democratic party and warm adherents of the late William Goebel, of whom they were warm partisans and adherents and that only one of said venire is a member of the Republican party to which party the affiant belongs; that this condition as to the political person-el of said venire was not the result of accident, inadvertance or chance but was the result of a deliberate design on the part of the officers charged with the duty of selecting and summoning said venire; that said venire, so selected by said officers with express reference to the political and partisan proclivities and attachments of the citizens composing it and because they were members of the Democratic party and personally friendly to the said William Goebel, and personally and politically hostile to this affiant and were so selected and summoned with a view to prejudice this affiant and to deprive him of a fair and impartial trial.

Affiant further states that the officers of this court and county who selected and summoned said special venire are all members of the Democratic party and were earnest and ardent adherents and supporters and friends of the said William Goebel and opposed politically to this affiant and that said officers desired the conviction of this affiant of the crime of which he is charged.

570 The affiant further states that the venire in question was selected and summoned by order of this court from Bourbon county; that said county is about equally divided between the Democratic and Republican parties; that at the regular annual election held in said county in 1896 there were about forty eight hundred votes cast by all the voters participating in said election and that of this number about twenty six hundred votes were cast for William McKinley the Republican candidate for President, and about twenty two hundred votes for William Bryan, the Democratic candidate for the same office, and the votes for the other candidates on the said tickets, voted for at said election, bore about the same relation to each other; and at the regular annual State election held in said county in November 1899, five thousand votes were cast by all parties and of this number about twenty five hundred votes were cast for the Republican candidates.

Affiant further states that said Republican voters and citizens of Bourbon county are with some exceptions of equal character standing and intelligence with the Democratic citizens and voters and possessed all the necessary and required qualifications for jury service. Affiant further states that at the time the present venire were selected and summoned herein the proportion of the Democratic citizens residing in Bourbon county as compared to the Republican citizens and voters therein was substantially and approximately the same as shown by the election returns for said county for the years 1896 and 1900 as above stated, and that said Republicans were of equal character, standing and intelligence with the Democrats and possessed all the necessary and required qualifications for jury service and that there are now — at the time the aforesaid officers undertook to perform their duty of selecting and summoning the special venire under the

orders of this court, residing in Bourbon county, citizens and  
 571 voters who are members of Republican party of equal character and standing and intelligence with those actually summoned on the venire, and that such Republicans possessed all the necessary legal qualifications for jury service. And the affiant says that there are many hundreds of competent, fairminded and representative citizens of said Bourbon county, fully qualified for jury service, of the same political faith and affiliation of this affiant and a great many of whom could have been readily and conveniently summoned and who would give to both sides herein a fair and impartial trial but that none of such persons were summoned with the exceptions already stated for the reasons hereinbefore alleged.

So far as same is applicable to the second special venire now in question, the affiant refers to his affidavit heretofore filed on his challenge to the first special venire and his challenge to the panel first tendered herein and in support of affiant's motion to discharge all of said first special venire and said panel and each and all of the members thereof. And *th* makes and alleges as part hereof said affidavits, so far as applicable, a part of this affidavit, the same *the same* as if set out herein at length. And he now charges that discrimination exercised by the officers of this court and county and those advising with them and assisting them in selecting and summoning the first special venire from Bourbon county was repeated in the selection and summoning of the second special venire from said county.

Affiant further says that it would be impossible under these circumstances for him to avoid being tried at this term of this court except by a jury of his political opponents, and entirely made up, with one possible exception, of those who were the adherents and admirers of said William Goebel, and it will be impossible for him to obtain a fair and impartial trial before any jury so constituted and formed.

572 The affiant, Caleb Powers, says that the statements in the foregoing affidavit are true as he verily believes.

CALEB POWERS.

Subscribed and sworn to before me by said affiant, Caleb Powers, this 6<sup>th</sup> day of August, 1903.

L. F. SINCLAIR,  
 Ex. Scott County, Kentucky.

573 Scott Circuit Court.

COMMONWEALTH OF KENTUCKY

vs.

CALEB POWERS.

} Affidavit of R. B. Boulden.

The affiant R. B. Boulden states that he is a resident of Millersburg, Bourbon county, Kentucky, that he has resided in said county

for a great length of time and is acquainted with the turnpike roads, and the citizens thereof residing along and on said roads.

He says that he is informed, believes and charges that the officers summoning the second special venire from Bourbon county pursuant to the orders of this court, in the town of Millersburg, purposely omitted and failed to summon C. W. Howard a competent and qualified juror, because said Howard was a Republican in politics, and summoned Cole Corrington and D. P. Jones, Democrats. He says that said C. W. Howard is in business immediately across the street from where said Corrington and Jones are in business.

He says that on the Maysville and Lexington pike, said officers, he is informed, believes and charges, purposely failed to summon D. M. Hurst, M. M. Snapp because they were Republicans and summoned J. J. Peed, A. B. Campbell, Democrats. He says that said Hurst and Snapp reside in the immediate vicinity on said road where said Peed and Campbell reside.

He states that he is informed, believes and charges that said officers on the Colville pike purposely failed to summon I. N. Brown because of his politics and summoned John Shannon a Democrat. He says that said Brown is competent and qualified for jury service and resides on that part of said road where said Shannon resides.

R. B. BAULDEN.

574      Subscribed and sworn to before me by R. B. Baulden this the 6<sup>th</sup> day of August, 1903.

L. F. SINCLAIR,  
Ex. Scott County, Kentucky.

575

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
vs. }  
CALEB POWERS, Defendant.

Affidavit of Z. D. Lusby, William Rogers, James Gibson, E. P. Clark, Joseph Williams and James Burke contraverting the affidavits filed by defendant in support of his motions to discharge second special venire and his first and second motions to discharge the panel herein.

The affiant Z. D. Lusby says that he is a citizen and deputy sheriff of the county of Scott. Affiant, William Rogers, says that he is a citizen and deputy sheriff of the county of Scott. Affiant E. P. Clark, says that he is a citizen and deputy sheriff of the county of Bourbon. Affiant, Joseph Williams, says that he is a citizen and constable of the county of Bourbon. Affiant, James Burke, says that he is a citizen and deputy sheriff of the county of Bourbon. Affiant, James Gibson, says that he is a citizen and deputy sheriff of the county of Bourbon.

Affiant-, Z. D. Lusby, William Rogers, James Gibson, E. P. Clark, Joseph Williams and James Burke, says that it is untrue that of the second venire summoned for jury service in this action, who reported to this court on Thursday, August 6<sup>th</sup>, 1903, that only one of said veniremen is a member of the Republican party. They say that it is untrue that there was any deliberate design on the part of the officers charged with the duty of selecting and summoning said venire to either select or summon them with express reference to the political and partisan proclivities and attachments of the citizens composing it. They say it is untrue that said veniremen or any of them were either selected or summoned with a view to prejudice the defendant Caleb Powers, or to deprive him of a fair and impartial trial.

Affiant-, Z. D. Lusby and William Rogers, say that they are the only officers in the county of Scott who participated in selecting and summoning said special venire; and they say further that it is untrue that they or either of them desire or desired the conviction of this defendant of the crime of which he is charged, unless he is proven guilty; and that in the discharge of their duties as deputy sheriffs of Scott county in the selection and summoning of said special venire, they honestly and faithfully discharged their duties under their oaths of office and the law, without any thought other than to secure sober, intelligent, discreet citizens of Bourbon county, qualified under the law for jury service, and that they had no desire or intention to prejudice the defendant in his rights to a fair and impartial trial.

These affiants say that of the total number of Republican voters of Bourbon county mentioned in the affidavit of Caleb Powers filed herein, more than eighty-five per cent. are illiterate and not intelligent, sober, discreet citizens of the county qualified for jury service.

Affiant- William Rogers, Z. D. Lusby, Joseph Williams and James Burke, in so far as same is applicable to the second special venire now in question, refer to their affidavits heretofore filed on defendant's challenge to the first special venire first tendered herein, and they make as part hereof their said affidavits so far as applicable, the same as if set out herein at length.

These affiants say that no discrimination for political reasons was exercised by the officers of this court and county, or the officers of Bourbon county who accompanied them when they, the officers of Scott county, selected and summoned either the first or second special venire from Bourbon county.

These affiants say that one Thomas Whaley, whose affidavit is filed by defendant, Caleb Powers, herein in support of his motion to discharge the panel first tendered as well as the entire venire of 95 persons first summoned, was in the city of Paris at the time of the summoning of said venire by the officers of Scott county; that they had information and believed that he desired to be summoned as a juror to try this case; that he sought and by his actions tried to force the officers of Scott county to summon him as



a venireman, but that they had information that said Whaley was not a housekeeper, that he was an assistant rural route mail carrier for the United States Government in Bourbon county; that he had canvassed in the city of Paris and Bourbon county, soliciting subscriptions to a fund to be used in the defense of Caleb Powers under this charge; that they did not deem him a qualified juror under the law, and for these reasons did not summon him when he put himself in their way; and they say further that when the officers of Scott county had failed to summon him as he desired, that he became enraged and denounced these officers up and down the streets of the city of Paris; and they say further that said Whaley accompanied from Paris in Bourbon county to Georgetown in Scott county, the first venire summoned here, coming on the same train with them, went to defendant and furnished defendant his, Whaley's affidavit herein, and has since sat with defendant and his counsel aiding and assisting them in the selection of the jury to try this case.

These affiants say that Whaley was not the only resident of Bourbon county who undertook to force himself upon the officers of this county when they were summoning the venires herein; that there were Democrats who undertook to do the same thing, but in  
578 order to avoid a packed jury, and that this defendant might have a fair and impartial jury to try his cause, the officers of Scott county summoning these venire-men purposely avoided summoning any such.

Affiants, Z. D. Lusby, William Rogers, James Gibson, E. P. Clark, Joseph Williams and James Burke, say that the statements in the foregoing affidavit are true to the best of their knowledge and belief.

Z. D. LUSBY.  
WILLIAM ROGERS.  
JAS. A. GIBSON.  
E. P. CLARKE.  
JOS. WILLIAMS.  
JAMES BURKE.

Subscribed and sworn to before me by Z. D. Lusby, William Rogers, Jas. A. Gibson, E. P. Clark, Joseph Williams and James Burke this 6<sup>th</sup> day of August, 1903.

T. P. PENN,  
Clerk Scott Circuit Court,  
By A. J. COFFEE, D. C.

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Scott Circuit Court, Aug. Special Term, Aug. 7", 1903.

COMMONWEALTH OF KENTUCKY }  
                                   vs.        } Order.  
 CALEB POWERS.

Came the defendant Caleb Powers and tendered and filed his written motion and grounds to discharge the panel of jurors herein selected to try this case and in support of said motion and grounds filed his own affidavit, to which motion the Commonwealth objected. And in opposition to said motion, refiled the affidavit of Z. D. Lusby, Wm. Rogers, James Gibson, E. P. Clark, Joseph Williams and James Burke, filed herein yesterday and the court being sufficiently advised, overruled said motion to which the defendant excepted.

The defendant then offered to file a special plea of pardon, to which the Commonwealth objected and the court refused to permit said plea to be filed, to which the defendant excepted. Thereupon the defendant filed his bill of exceptions, No. 3 duly signed by the court.

The affidavit of Caleb Powers referred to in the foregoing order (the counter affidavits of Z. D. Lusby, Wm. Rogers, James Gibson, E. P. Cook, Joseph Williams, and James Burke were copied under order of yesterday), the motion to discharge the panel, and the affidavit of Caleb Powers in support of same, with special plea or pardon, bill of exception No. 3, are as follows:—

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, } Affidavit of Caleb Powers in Sup-  
       Plaintiff,                       } port of Motion to Discharge  
                                   vs.        } Panel.  
 CALEB POWERS, Defendant.

The affiant Caleb Powers states that on the 2" day of the present special term of this court the judge thereof directed the sheriff of Scott county, Kentucky, to summon a special venire from Bourbon county Kentucky; that William Rogers and Z. D. Lusby deputy sheriffs of Scott county, Kentucky, in pursuance of said order summoned said special venire. He says that said venire consisted of ninety five persons and only two or possibly three of said venirement were Republicans, the remaining ninety two or three persons were all Democrats, the partisan adherents and admirers of the late William Goebel. He states that thereafter said judge ordered said sheriff to summon another special venire from Bourbon county, Kentucky; that said Rogers and Lusby in pursuance to the last mentioned order, summoned a venire of eighty one persons; that out of said eighty one persons there was only one Republican; the remaining

eighty veniremen being Democrats and partisan adherents and admirers of the late William Goebel. He says that out of the two special venires aforementioned he has been compelled to accept a jury to try this affiant upon the charge preferred in the indictment herein for the reason that under the laws of the State of Kentucky this defendant is allowed only fifteen peremptory challenges and that these have been exhausted. He states that he ought not to be put upon this trial before a jury who were summoned as veniremen solely on account of their political hostility to this affiant, and by reason of the facts set out herein and the facts heretofore set up in the affidavit of this affiant and that of one Thomas Whaley, 581 in support of his motion to discharge the panel first tendered this affiant, as well as the entire venire of ninety five persons first summoned, and by reason of the further facts set up in the affidavit of this affiant in support of his motion to discharge the said second venire of eighty one persons, (which affidavits he now refers to and adopts as part hereof as though fully written out herein) because he says that this affiant cannot and will not have received that kind of a trial before said jury as is guaranteed him under the laws of the State of Kentucky and the constitution of the United States wherein it is provided that every citizen accused of a crime is entitled to a trial before a jury impartially selected.

CALEB POWERS.

Subscribed and sworn to before me by Caleb Powers this 6<sup>th</sup> day of August, 1903.

L. F. SINCLAIR,  
Ex. Scott County, Kentucky.

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Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Motion to Discharge Panel.
vs. CALEB POWERS, Defendant.	

The defendant, Caleb Powers, comes and moves the court to discharge the panel made up from the two special venires heretofore summoned from Bourbon county, pursuant to an order of this court because he says that all of said veniremen, from the two special venires, were not impartially summoned, but on the contrary were selected from the partisan adherents and admirers of the late William Goebel and purposely summoned because of their political hostility to this defendant, and for the further reason that under the laws of the State of Kentucky, he is allowed only fifteen peremptory challenges all of which have been exhausted, and because of the further fact that the defendant cannot and will not have received that kind of a trial, if tried before said jury, as is guaranteed him under the

laws of the State of Kentucky and the Constitution of the United States, wherein it is provided that every citizen accused of a crime is entitled to a trial before a jury impartially selected. And in support of said motion to discharge said panel, the defendant files his affidavit herein.

J. R. MORTON, ETC.,  
Att'ys for Defendant Powers.

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Scott Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,	} Bill of Exceptions No. 3.
vs. CALEB POWERS, Defendant.	

Be it remembered that after the jury had been selected to try this case and before said jury was sworn the defendant Caleb Powers moved the court to permit him to file a special written plea of pardon, marked B, which plea is in words and figures as follows:— (Heretofore copied by the clerk.)

To the filing of said plea The Commonwealth objected and the court being sufficiently advised thereon sustained said objection and refused to permit the defendant to file same, to which ruling of the court the defendant excepted at the time and still excepts, and thereupon tendered this his bill of exceptions which is now signed and sealed and made a part of the record of this case.

R. E. ROBBINS, Judge.

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Scott Circuit Court.

THE COMMONWEALTH OF KENTUCKY,	} Special Plea of Pardon.
Plaintiff,	
vs. CALEB POWERS, Defendant.	

Comes the defendant, Caleb Powers, and says that on the 10<sup>th</sup> day of March, 1900, he was pardoned of the crime with which he is charged in the indictment, herein, by William S. Taylor, who was then governor of Kentucky, and he refers to and pleads same in bar of further proceedings under said indictment. He says that at the annual election held on the 7<sup>th</sup> day of November, 1899, the said William S. Taylor was a candidate and was voted for for the office of governor of Kentucky; that on the 9<sup>th</sup> day of December 1899, the State board of election commissioners adjudged and certified, according to law, that the said William S. Taylor had received the highest number of votes cast for, and was elected to said office of governor for the term prescribed by the constitution of Kentucky, and issued to said Taylor a certificate of election to said office; that

on the 12<sup>th</sup> day of December, 1899, the said Taylor qualified, as required by law, by taking the oath of office before the Honorable James H. Hazelrigg, chief justice of the court of appeals of Kentucky, was inaugurated governor of said State, and immediately entered upon the discharge of the duties of said office, and took possession of the executive offices and buildings provided by the State for its governor, and of all books, papers and other archives pertaining to said office; that from the date of his qualification, on December 12<sup>th</sup>, until the 21<sup>st</sup> day of May, 1900, the said William S. Taylor was in continuous possession of said office, buildings, papers, records and archives of government and performed the duties and functions of said office, claiming at all times to be the governor of Kentucky, and to have the right and title to said office by reason of his said election thereto and the certificate thereof; that as such he was recognized by the secretary of state, the auditor of public accounts, the treasurer, the attorney general, and by other State officers and by the public, and defendant avers that he was the governor of Kentucky from the 12<sup>th</sup> day of December, 1899, until the 21<sup>st</sup> day of May, 1900. Defendant further says that William Goebel was an opposing candidate for said office, and that he contested the election thereto of said William S. Taylor; that J. C. W. Beckham was a candidate at said election for the office of lieutenant governor of Kentucky and that he contested the election thereto of John Marshall; that said Marshall was a candidate, and was voted for, for the office of lieutenant governor at said election, and that on the 9<sup>th</sup> day of December, 1899, the State board of election commissioners duly awarded and issued to said Marshall a certificate of election to said office as the candidate receiving the highest number of votes cast therefor, and that on the 12<sup>th</sup> day of December, following, the said Marshall qualified by taking the oath of office required by law, and at once entered upon the discharge of the duties of said office; that said Taylor and Marshall had been citizens of Kentucky for six years next before, and were thirty<sup>yt</sup> years of age at the time of their election to said offices, and were duly qualified when elected to hold same. Defendant avers and charges that the said contests for the governorship and lieutenant governorship of Kentucky were never passed upon or determined by both houses of General Assembly, as required by the constitution of said State and the laws enacted in conformity therewith; that subsequent to said election, said contestants had entered into an agreement with divers members of the legislature to set aside and nullify same by the institution of said contests before them, and that pursuant thereto the contest boards were fraudulently selected, not by lot as the law requires; that as a result of said fraudulent selection, ten of the eleven members of the board to try the governor's contest were partisans of the said contestant Goebel and nine of the eleven members of the board to try the lieutenant governor's contest were partisans of the said contestant, Beckham; that a number of the members of both of said boards were disqualified from sitting, because they

had advised that said contests be made, and had promised to make them effective; that at least one member of the board selected to try the governor's contest had wagered money that the said contestant Goebel would be elected; that in the pretended trials of said contest, said boards had acted in an illegal and tyrannical manner in the admission and rejection of testimony and in all matters pertaining to the conduct of said trial.

Defendant further says that said contest for the governorship was terminated by the death of the contestant William Goebel, on the 2<sup>nd</sup> day of February, 1900, that on January 31<sup>st</sup>, 1900, the said William S. Taylor as governor of Kentucky, by proclamation of that date duly issued, published and made known to the senators and representatives constituting the senate and house of representatives of the legislature of Kentucky, adjourned said legislature to meet in the city of London, Kentucky, on the 6<sup>th</sup> day of February, 1900; that from the time that said session of the legislature convened at Frankfort, on January 2<sup>nd</sup>, 1900, until the said adjournment by the governor, its sessions had been held at the State house in Frankfort, Kentucky, the seat of government, the senate in the senate chamber, and the house in the hall of the house of representatives in said

587 State house; that there was no meeting of said legislature, or of either house thereof, at London, Kentucky, or at the State house in Frankfort, from the adjournment by said proclamation on January 31<sup>st</sup>, 1900, until both houses reconvened at Frankfort on February 19<sup>th</sup>, 1900. Defendant avers and charges that from and after the 26<sup>th</sup> day of January, 1900, until the expiration by limitation of said session on March 13<sup>th</sup>, 1900, without fault upon the part of the public printer, the journals of each day's proceedings were not published, or placed upon the desks of the members of the said houses, as required by law; that there are no originals of the journals of the proceedings of said legislature or either house, thereof, and that none were ever prepared, or kept, as the law required; that the printed volumes published by, or for, the Commonwealth of Kentucky, purporting to be copies of said journals, were not prepared or published by or under the supervision of the clerks or assistant clerks of said bodies and defendant avers and charges that said printed volumes were edited printed and published by, or under, the supervision of one G. Allison Holland, and that the said printed volumes were never approved by said houses, or either of them, or by any one thereunto by law authorized in order to give same the sanction of verity; that all of these facts are shown in said journals in what purports to be a joint resolution of said houses, passed on March 13<sup>th</sup>, 1900, purporting to direct their publication as aforesaid, none having been printed daily since Jan. 26<sup>th</sup>, 1900, as aforesaid; that neither said printed volumes, nor the daily proceedings in any form after Jan. 26<sup>th</sup>, 1900, were so published until a period of more than sixty days after said final adjournment on March 13<sup>th</sup>, 1900. Defendant says that no journals were prepared by the clerks or assistant clerks of said bodies, or kept or published daily, or at all, for the



dates of Jan. 31", 1900, Feb. 1" and 2", 1900, that on Jan. 31", 1900, the day on which it is stated in said alleged printed copies that at a joint session of said two houses, William Goebel was declared governor and J. C. W. Beckham lieutenant governor there was, in fact, no session of said houses in joint session, and no such action, or any action, taken on that day by either of said houses in joint or separate session; that there was no meeting whatever of either of said bodies, or of the two jointly, had or held on February 1", 1900; that, if on Jan. 31", 1900 or Feb. 1", 1900, there was an attempt by any member of either of said bodies, to have or hold a meeting of said bodies, or either of them, the same was not at the regular or customary place or places for such meetings, was not pursuant to any adjournment, and was without notice of the time or place thereof to the members constituting said bodies, respectively, or to the said contestees William S. Taylor and John Marshall or either of them, or to the public, and especially without any such notice to the following named duly elected and qualified senators, viz:—Geo. H. Alexander, Thos. H. Hays, T. M. Hill, N. T. Howard, J. P. Huff, John Barrett, Curtis F. Burnam, Wm. H. Cox, C. H. Dye, B. S. Huntsman, J. C. Gillispie, J. J. Johnson, R. M. Jolly, T. S. Kirk, W. E. Miller, A. D. Roberts, R. S. Triplett, F. M. White and J. L. Whitehead, or to either of them, and divers others or to John Marshall, president of the senate; or to either of the following duly elected and qualified members of the said house of representatives, viz:—M. Abele, J. C. R. Aiken, J. W. Alexander, C. C. Bagby E. E. Barton, R. R. Benningfield, B. J. Bothurum H. Brister, W. M. Burkamp, J. W. Catron, R. C. Cochran, W. H. Collopy, James Cooper, J. P. De Long, W. U. Grider, W. H. Hall, L. W. Hampton, W. T. Harris, J. P. Haswell, E. P. Hays, M. R. Heissman, John T. Hinton, R. C. Jarnagin, Isaac Johnson, Jno. Kelday, W. T. Lafferty, 589 L. E. Leslie, W. W. Lewis, William Lewis, W. H. Lilly, B. H. Lott, J. A. Mahaffey, J. McDowell, P. M. McRoberts, R. F. Meadows, Emmett Orr, W. S. Randolph, E. H. Read, Ben T. Robinson, J. F. Rogers, J. P. Rose, R. W. Slack, R. H. Spurrier, J. D. Strong, J. H. Sturgell, P. H. Taylor, D. W. Tipton, E. E. Trivett, C. J. Walton, John M. Wilson and R. M. Yarberry and divers others, and no one of the said named senators or representatives or the president of the senate or the said contestees attended such alleged meeting or meetings and that there was not a quorum of the duly elected and qualified senators or representatives present thereat. And because of said facts, the defendant avers and charges that the pretended copies of the said alleged senate and house journals, there being no originals for the said dates of Jan. 31", 1900 and February 1", 1900, as printed by or for the Commonwealth of Kentucky, which defendant is informed, believes and charges were not kept, or published or printed daily as required by law, but have been edited, printed and published more than sixty days since the termination of the sessions of said legislature on March 13", 1900, purporting to show proceedings of sessions or meetings of the houses of said legislature on said dates,

which were never held, are false and fraudulent. Defendant says, as he is informed, that there was an attempted meeting of both houses of said legislature in separate and joint sessions, in a room at the Capitol hotel in the city of Frankfort, Kentucky, which was not and had not been a regular or customary place of the meeting or sitting of either of said houses, on the afternoon of February 2<sup>nd</sup>, 1900, by a portion of the members of those bodies; but defendant avers and charges that the said attempted meetings were held secretly, not pursuant to any adjournment, and without notice of the time or place thereof to the members constituting said bodies, or to the said contestees, William S.

590 Taylor and John Marshall, or to the public, and especially without such notice to the following named duly elected and qualified senators, viz:—Geo. H. Alexander, John Barrett, Curtis F. Burnam, Wm. H. Cox, C. H. Dye, J. C. Gillispie, Thos. H. Hays, T. M. Hill, N. T. Howard, J. P. Huff, B. S. Huntsman, R. M. Jolly, T. S. Kirk, J. H. McDonnell, W. E. Miller, A. D. Roberts, F. M. White, and J. L. Whitehead or either of them, and divers others, or to John Marshall, president of the senate, or to either of the following named duly elected and qualified representatives, viz:—J. L. Aiken, R. R. Benningfield, B. J. Bethurum, H. Brister, W. M. Burkamp, J. W. Catron, James Cooper, J. P. De Long, W. H. Crider, W. M. Hall, L. W. Hampton, W. T. Harris, J. P. Haswell, E. P. Hays, H. R. Heissman, Jno. T. Hinton, R. C. Jarnagin, Isaac Johnson, Jno. R. Kelday, J. E. Leslie, W. W. Lewis, William Lewis, W. H. Lilly, B. H. Lott, J. A. Mahaffey, J. McDowell, P. H. McRoberts, B. F. Meadows, Emmett Orr, W. S. Randolph, E. H. Read, Ben T. Robinson, J. F. Rogers, J. P. Rose, R. W. Slack, R. H. Spurrier, J. D. Strong, J. H. Sturgell, P. H. Taylor, C. W. Tipton, E. E. Trivett, S. L. Van Meter, C. J. Walton, John M. Wilson, and M. R. Yarbber, and divers others; and that no one of said senators and representatives, and neither of said contestees was notified or present at said attempted meetings, of February 2<sup>nd</sup>, 1900, the day on which it is stated in said printed journals that William Goebel and J. C. W. Beckham were declared, respectively governor and lieutenant governor of Kentucky; that on and after January 30<sup>th</sup>, 1900, there were one hundred duly elected and qualified representatives who constituted the house of representatives; and defendant avers and charges that at the November election, 1899, T. M. Hill was a candidate for,

591 and was elected to, the office of senator for the 25<sup>th</sup> senatorial district of Kentucky, and a certificate of his said election was issued to him, as required by law, and that on or before the forenoon of January 31<sup>st</sup>, 1900, the said T. M. Hill duly qualified as senator, by taking the oath of office, and defendant says that, upon the qualification of said Hill, there were then and thereafter, until the death of William Goebel, thirty-eight duly elected and qualified senators, who constituted the senate of the General Assembly of Kentucky, of whom it required not less than twenty to constitute a quorum, and that there was no quorum of the said senate

present at the said attempted separate or joint sessions, or sittings, on February 2", 1900. Defendant avers and charges that said William Goebel was not the governor of Kentucky on January 31", 1900, and never became such governor, and that William S. Taylor, invested with the full powers and authority of said office on December 12", 1899, continued to be the governor of Kentucky until his abdication of that office on May 21", 1900.

Further pleading, defendant says that on the 19" and 20" days of February, 1900, after said legislative bodies had reconvened at the state house in Frankfort, Kentucky, the said printed journals report that both branches thereof, in joint and separate sessions, declared by resolution that the said William S. Taylor and John Marshall had been unseated as governor and lieutenant governor, and the said William Goebel and J. C. W. Beckham, had been seated as governor and lieutenant governor, respectively, by the previous action of said bodies, that no further action on said dates, or at any other time, subsequent to the alleged action of February 2", 1900, was taken by said bodies, or either of them, touching upon, or looking to the determination of said contests; that on said days, February 19" and 20", 1900, the reports of the boards appointed to

592 hear and report upon said contests were not made to either of said bodies, in joint or separate session, as required by law; that no notice was given to said Taylor or Marshall that the said contests would be then tried or considered in any way; that no time was allowed for the consideration or discussion of said reports, or of the merits of said contests, and said Taylor and Marshall, or either of them, were not notified, were not heard in person, or by counsel, on either of said days, or at any time, before said bodies, or either of them, whether separately or jointly convened, which rights were accorded by the rules theretofore adopted by the said General Assembly for the trial and determination of said contests; that there are no originals of the journals as prepared by the clerks or assistant clerks, of said bodies, if so prepared, and the same were not published daily, or at all, for the said dates of February 19", or 20", 1900.

Paragraph # 2. Re-affirming the allegations of the foregoing paragraph, the same as if copied, herein, and re-asserting that William Goebel never became the governor of Kentucky and that William S. Taylor was elected, qualified, and served as governor of Kentucky from December 12 1899, until May 21", 1900, defendant says:—"That there were filed and presented contests for the offices of governor and lieutenant governor of Kentucky by the opposing candidates, William Goebel and J. C. W. Beckham, and that "both house- of the General Assembly" were by the constitution of Kentucky constituted the tribunals for determining such contests, "according to such regulations as may be (had been) established by law," that the regulations so established provided that the decision of the "contest board," or

593 committee, should not be final or conclusive, but should be reported to the two houses of the General Assembly, for the further action of the General Assembly, and that the General

Assembly should determine the contests; that the law and rules adopted by said houses provided; "Such report (of the contest board), when made shall be immediately taken up for consideration and discussion for a time of not exceeding six hours one half of which shall be allotted to each side." Defendant avers and charges that such regulations or rules of procedure were not followed; that no report of the contest board was made to the two houses of the General Assembly at any time; that no notice was given of the pretended trial or determination by such tribunal of said contests, or either of them; that no opportunity was given to either of the parties, contestees, then holding said offices, or to their counsel, or representatives, to be heard upon the questions involved; that the alleged sittings of said tribunals, if any there were, which is denied, for the dates of January 31<sup>st</sup>, 1900, February 1<sup>st</sup> or 2<sup>nd</sup>, 1900, were secret; that the alleged proceedings of said houses, as entered in the pretended printed copies of the alleged journals for said dates were false and fraudulent; that there were no such meetings, no such journals, and no such action, in fact, taken as set out in said pretended printed copies of said alleged journals; that the reported actions of said houses on February 19<sup>th</sup>, and 20<sup>th</sup>, 1900, did not lawfully determine said contests. Defendant says that the prosecution of this case proceeds and is predicated upon the alleged action of the said houses of the General Assembly, particularly for the dates of January 31<sup>st</sup>, 1900, and February 2<sup>nd</sup>, 19<sup>th</sup> and 20<sup>th</sup> 1900, in the pretended trial and determination of said contests, and upon the pretended decision that said William S. Taylor was not the governor of the State of Kentucky, and his acts as such were without authority of law, and his

594 grant to defendant of executive pardon for the crime with which defendant is charged herein, is of no legal effect and void, and that, because of such pretended trial and determination of said contests, the defendant is amenable to the law under the indictment, herein. Defendant says that the alleged actions of said houses of the General Assembly were taken without due process of law and without the notice or knowledge of the said Taylor, or Marshall, or this defendant, and deprives defendant of his liberty without due process of law, all of which is contrary to and prohibited by amendment XIV of the Constitution of the United States, which provides that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Defendant further says that the facts in support of this plea with regard to the pretended legislative trial and determination of said contests that have come to his knowledge since the plea of pardon was made at his last trial under said indictment, and he now comes and offers to prove all material averments of fact herein, in support thereof.

Wherefore defendant prays that his pardon by William S. Taylor on March 10<sup>th</sup>, 1900, be recognized as the act of the governor of



597 Scott Circuit Court, August Special Term, Aug. 29<sup>th</sup>, 1903.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

Come again the parties to this cause : the jury heretofore sworn to try this case again appeared in their seats. The jury retired to their room to consider a verdict and afterwards brought into court the following verdict, "Georgetown, Kentucky, Aug 29<sup>th</sup>, 1903. We, the jury, find the defendant, Caleb Powers guilty and fix his punishment death. Geor. W. Wyatt, foreman."

Wherefore it is adjudged by the court that the defendant be remanded to jail to await the sentence of the court :

Thereupon came the defendant and entered motion and filed reasons for a new trial, which reasons are heroby made a part of the record ; thereupon came the defendant and moved the court to continue the hearing for a new trial and allow the defendant until some day next week to file additional grounds for a new trial, and in support thereof filed his affidavit which is noted, to which the Commonwealth objected. The court being advised overruled the motion to which the defendant excepted ; thereupon the court being advised overruled the motion for a new trial, to which the defendant excepted ; thereupon the defendant by counsel objected to the court passing judgment upon the defendant at this time, which objection was overruled, to which the defendant excepted.

The defendant being present in court, and being informed of the nature of the indictment, plea and verdict was asked if he had any legal cause to show why judgment should not be pronounced against him, and none being shown it is adjudged by the court  
 598-605 that the defendant be taken to the jail of Scott county and there safely kept until the 25<sup>th</sup> day of November, 1903, on which day, between sunrise and sunset the sheriff of Scott county shall hang him by the neck until he is dead, to which he excepted.

The defendant having prayed an appeal to the court of appeals from said judgment, the appeal is now granted and the defendant is granted until the fourth day of the October term of this court to prepare and file his bill of exceptions and the judgment is now suspended until sixty days after the filing of said bill of exceptions.

The motion and reasons for a new trial referred to in the foregoing order are as follows :—



606

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Motion and Grounds for a New Trial.
vs. CALEB POWERS, Defendant.	

The defendant now comes and moves the court to grant him a new trial upon the following grounds:—

1st. Error of the court in refusing to continue the trial of the cause upon the affidavit of the defendant filed in support of his motion for continuance.

2nd. Error of the court in not instructing the jury that the statements of absent witnesses, contained in the affidavit for continuance and read to the jury, were to be taken by the jury as true and not merely as depositions of said witnesses.

3rd. Error of the court in refusing to permit the defendant to file a special plea of abatement offered and tendered.

4th. Error of the court in refusing, upon the motion of the defendant, to admonish and instruct the sheriff that in summoning a jury under the order for a special venire from Bourbon county, that he should select jurors without reference to and regardless of their political affiliations; and the error of the court in overruling defense's motion to form a jury to try the defendant composed of jurors of each political party and as nearly in equal numbers as practicable.

5th. Error of the court in overruling the defendant's motion to discharge the panels of jurors tendered him and the error of the court in overruling defendant's motion under the order directing venires from said county.

6th. Error of the court in refusing to allow the defendant, upon his motion, to file a special plea of pardon by him tendered and offered to be filed.

607 7th. Errors of the court in the admission of evidence to the jury incompetent and irrelevant to the prejudice of the substantial rights of the defendant, to the admission of which evidence the defendant at the time objected and excepted.

8th. Errors of the court in refusing competent and relevant evidence offered by the defendant to the jury, to the ruling of the court in refusing such evidence to go to the jury, the defendant at the time excepted.

9th. Error of the court in giving to the jury, over the objection of the defendant, the instructions numbered from one to eleven inclusive and in giving which said instructions to the jury, over the objection of the defendant, and to which ruling of the court, the defendant at the time excepted.

10. Error of the court in refusing, upon the motion of the defendant, to properly instruct the jury upon the law as applicable to the whole case.

11''. Error of the court to properly instruct the jury.

12''. Error of the court in refusing to give to the jury the instructions asked for by the defendant numbered from A to L inclusive ; and the error of the court in refusing to give to the jury any of said instructions asked for by the defendant to which rulings of the court in refusing to give said instructions or any of them to the jury, the defendant at the time excepted.

13''. Error of the court in making certain statements in the presence of the jury to the prejudice of the defendant, to which the defendant at the time objected and excepted.

14''. The verdict of the jury is against the law.

15''. The verdict of the jury is against the evidence.

16''. Error of the court in over-ruling defendant's motion to strike out or withdraw from the consideration of the jury so much  
608 of the evidence heard upon the trial as related to the movement and acts of the militia subsequent to the shooting of Sen. Goebel, except the acts of W. S. Taylor in calling out the militia and the movements and acts of the military company stationed in the arsenal.

17''. Error of the court in refusing and over-ruling defendant's motion to strike from and withdraw from the jury all evidence relative to the gathering of a crowd at Frankfort during the canvass of the returns.

18. Error of the court in over-ruling defendant's motion to exclude from the consideration of the jury all evidence relative to bringing of witnesses to Frankfort to be used upon the contest pending before the contest committees.

19''. Error of the court in over-ruling defendant's motion to exclude from the jury all evidence relative to the organization and movement and acts and declarations of the crowd which came from eastern Kentucky and other parts of the State to Frankfort on Jan. 25''.

20''. Error of the court in refusing to exclude from the consideration of the jury the statement made by Mr. Campbell in argument, representing the prosecution, to-wit:—that Jim Howard was not hung but eleven of the jurors were for hanging him and one juror was for a life sentence and the eleven had to come to one." To which statement made by Mr. Campbell the defendant objected and asked the court to exclude the same from the jury. The court refused to exclude said statement from the jury and to which ruling of the court the defendant at the time excepted and still excepts.

CALEB POWERS,

By J. R. MORTON, Att'y.

609

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

The affiant Caleb Powers in support of his application for the postponement of the hearing of his motion for a new trial and in support of his applications to be allowed further time to file additional grounds for a new trial now states that the verdict of the jury in this case was returned into court about eleven and a half o'clock a. m. Aug. 29<sup>th</sup>, this day, and that, without intermission and without even having time to lunch or dinner his counsel have been incessantly engaged in the preparation of his motion for a new trial. He further says he is advised by his counsel that there are other valid and material grounds he should rely upon for a new trial, but that the information relative to such grounds is not made therein in such form as admits at this time of a proper presentation to the court, but the affiant believes such information can be reduced to a proper form within the next five or six days.

He says his delay asked is in good faith and only for the purpose of securing to himself a fair and full hearing by this court of his motion for a new trial. He further says that next week and all of said week is available to this court for holding this special term of the court.

CALEB POWERS.

Sworn to before me by Caleb Powers, the 29<sup>th</sup> day of August, 1903,  
 at 2:35 o'clock.

L. F. SINCLAIR,  
 Ex., Scott County.

610

Scott Circuit Court, October Term, Oct. 8<sup>th</sup>, 1903.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

The defendant Caleb Powers now comes and moves the court to set aside the order hereinbefore entered in this case at the last term of this court, overruling and refusing defendants motion for a new trial and that he be permitted to file other and additional grounds for a new trial of his case and offered to file in support of this motion his own affidavit and the affidavit of W. H. Wood, R. A. Rose, Lee Dever, W. A. Barns and W. H. White,

To said motion and the filing of said affidavit the Commonwealth objected and overruled said motion and refused to permit said affi-

davit to be filed, to which ruling of the court the defendant at the time excepted and still excepts, and thereupon tendered his bill of exceptions, making said affidavits a part of the record, which is signed and made a part of the record of this case.

The bill of exceptions etc. and the affidavit of Caleb Powers and the affidavit of W. H. Wood, R. A. Rose, Lee Dever, W. A. Barns, and W. H. White, referred to in the foregoing order are as follows:—

611

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Bill of Exceptions.
vs.	
CALEB POWERS, Defendant.	

Be it remembered upon the call of the above styled cause for trial, the Commonwealth answered ready for trial. Thereupon the defendant asked leave to file a written plea in abatement and bar at the time of the tender of said plea, the filing of which was refused—announced to the court that the defendant was not ready for trial of said plea in abatement, and tendered his affidavit in support of the postponement of the trial of said plea.

The court over-ruled the defendant's motion to file said plea; to which ruling of the court, the defendant, at the time, excepted and thereupon tendered a bill of exceptions making said written plea and affidavit accompanying the same a part of the record; which said bill of exceptions was signed by the judge and made a part of the record and is in words and figures as follows:—

The defendant, in support of his motion for a continuance of the cause, filed his affidavit and amended affidavit, which are in words as follows, to wit:—

(Here copy bill of exceptions No. 1 entered August 4<sup>th</sup>, 1903; and affidavit and amended affidavit for continuance.)

612

The Commonwealth, by its attorney, objected to the continuance, but consented that the statements of the witnesses as set forth in the affidavit subject to objection on account of competency and relevancy might be read to the jury as the deposition of said witnesses, except the statements of John S. Sweeney and William Sweeney. The court held that the defendant, as to the said absent witnesses mentioned, had not shown due diligence to obtain their presence and thereupon over-ruled plaintiff's motion for a continuance upon the consenting of the Commonwealth, by its attorney, that the statements of all of the witnesses contained in said affidavit and amended affidavit and subject to objections for competency and relevancy, might be read to the jury, if the presence of said witnesses was not obtained, except the statements of the two Sweeney's aforesaid. To which ruling of the court, the defendant, at the time excepted.

The court thereupon directed a special venire of one hundred

men to be summoned from Bourbon county to appear on the — day of August, 1903, and further ordered a second venire from the same county to be summoned to appear on the — day of August, 1903, immediately upon the entering of said orders to summon said special venire, the defendant moved the court that the jury selected to try the defendant be composed of six Republicans and six Democrats. To this motion, the Commonwealth objected and the court sustained the objection. To which ruling of the court the defendant excepted.

Thereupon the defendant moved the court to admonish the officers, directed to summon the said venire from Bourbon county, to select jurors without reference to their party affiliation. The Commonwealth objected to the motion and the court sustained the ob-

613 jection and over-ruled the motion and refused to so admonish the officers, to which ruling of the court, the defendant, at the time, excepted and thereupon tendered his bill of exceptions containing said motions and the rulings of the court thereon in order to make the same a part of the record; which said bill was signed by the judge and the same ordered to be made a part of the record. Said bill of exceptions is marked "Bill of Exceptions No. 2" and is in words and figures as follows to-wit:—

(Here copy bill of exceptions No. 2.)

614 During the progress of the formation of the jury and after a panel of twelve jurors was tendered to the defendant for challenge, the defendant made his challenge to the panel of jurors and to each juror tendered him and entered his motion that said panel and each jurors thereof and the special venire summoned from Bourbon county be discharged which said motion is in words and figures as follows:—to-wit:—

(Here copy motion filed and noted August 6", 1903.)

And, in support of said motion, the defendant filed  
615 & 616 his own affidavit, which is in words and figures as follows, to-wit:—

(Here copy affidavit of defendant, filed and noted August 6", 1903.)

617 Also, in support of said motion, the defendant filed the affidavit of Thomas C. Whaley, which said affidavit is in words and figures as follows, to wit:—

(Here copy affidavit of Thomas C. Whaley, filed and noted August 6", 1903.)

618 Upon the trial of said motion, the Commonwealth filed the joint affidavit of William Rogers and James Burke, which said affidavit is in words and figures as follows, to-wit:—

(Here copy affidavit of William Rogers and James Burke, filed and noted August 6", 1903.)

619 The Commonwealth also filed, upon trial of said action, the joint affidavit of Z. D. Lusby and Joe Williams, which said affidavit is in words and figures as follows, to-wit:—

(Here copy affidavit of Lusby and Williams filed and noted August 6'', 1903.)

620 The defendant moved the court to discharge the second venire summoned from Bourbon county, which said motion is in words and figures as follows, to-wit:—

(Here copy motion filed and noted August 6'', 1903.)

621 And, in support of said motion, the defendant filed his affidavit, which is in words and figures as follows, to-wit:—

(Here copy affidavit of Caleb Powers in support of motion to discharge second venire, filed and noted August 6'', 1903.)

622 And the defendant also filed, in support of his motion, the affidavit of R. B. Boulden, which is in words and figures as follows, to-wit:—

(Here copy affidavit of R. B. Boulden, filed and noted August 6'', 1903.)

623 The Commonwealth filed, upon the trial of said motion, the joint affidavit of Z. D. Lusby, William Rogers, James Gibson, E. P. Clarke, Joe Williams and James Burke, which said joint affidavit is in words and figures as follows, to-wit:—

(Here copy affidavit of Lusby, Rogers, Gibson, Clarke, Williams and Burke, filed and noted August 6'' 1903.)

624 The affidavit of said Lusby, Williams, Rogers, Gibson, Clarke and Burke, was also considered read upon the trial of the motion to discharge the panel and first venire. The court, after consideration, over-ruled by separate orders both of said motions and refused to sustain defendant's challenge of said jurors, and refused to discharge the two venires summoned from Bourbon county, to which ruling of the court, the defendant, at the time excepted and still excepts. Thereafter the selection and formation of the jury was proceeded with and, after the defendant had exhausted the challenges allowed him by law and a juror selected over his objections the jury was completed but, before said jury was sworn, the defendant moved the court to discharge the panel made up from the two special venires summoned from Bourbon county, which said motion to discharge said panel is in words as follows, to-wit:—

(Here copy motion to discharge panel, filed August 7'', 1903.)

625 And, in support of said motion, the defendant filed his affidavit, which is in words and figures as follows, to-wit:—

(Here copy affidavit of Caleb Powers, filed August 7'', 1903.)

626 After consideration, the court over-ruled said motion. To which ruling of the court, the defendant at the time, excepted and still excepts.

Thereupon after the jury was sworn, the defendant renewed his motion to discharge the panel, made as aforesaid which was over-ruled by the court, and to this ruling defendant excepted and the defendant entered his plea of not guilty, and further offered to file, and asked leave to file and enter, his special plea of pardon, which said special plea of pardon was in writing. The court refused to allow the same to be entered or filed but permitted the same to be



endorsed by the clerk offered, and then overruled defendant's motion to enter and file said plea. To which ruling of the court, the defendant, at the time, excepted and still excepts. And, for the purpose of making said writing and special plea of pardon a part of the record, the defendant tendered his bill of exceptions, which was signed by the judge of the court and by his order made a part of the record. Said bill of exceptions is in words and figures as follows, to-wit:—

(Here copy bill of exceptions No. 3, filed and noted August 7", 1903.)

627 The indictment was then read to the jury by the Commonwealth's attorney, to which indictment the defendant waived formal arraignment, which indictment is in words as follows:—

(Here copy indictment.)

Heretofore copied.

628 The statement of the case was then made by Hon. T. C. Campbell, on behalf of the Commonwealth, and by Hon. J. R. Morton, on behalf of the defendant. Clarence E. Walker, upon motion of the Commonwealth was thereupon appointed official stenographer in this cause by the court and qualified as such by taking the oath prescribed by law, and, upon motion of the Commonwealth's attorney, said official stenographer was ordered and directed to take a full stenographic report of the testimony and proceedings herein and make and file herein a full and accurate transcript of said report.

The Commonwealth then introduced as witnesses on its behalf Dr. E. E. Hume, Dr. John G. South, Dr. J. R. Ely, Dr. T. R. Welch, D. Meade Woodson, Zack Thomasson, Ed Porter Thompson, Frank Heeney, Newton Frazier, J. J. Johnson, Ed Porter Thompson, (re.) R. E. Combs, Mrs. Fannie Heffner, Julian Kersey, J. D. Watson, Bennett H. Young, D. M. Woodson, (re.) Graham Vreeland, Frank Cecil, J. F. Hawn, J. K. Watkins, L. W. Hampton, J. H. Hazelrigg, R. H. Berryman, Enoch May, Mrs. W. B. Anderson, D. R. Murray, George Lockard, J. C. Cantrill, John M. Golden, James Fletcher, W. P. Reeder, John A. Black, Frank Hutchinson, Steele Redding, Silas Jones, B. F. Suter, Dudley Williamson, Ella Smith, Henry Hazelwood, South Trimble, H. C. Hazelwood, (Re.) John Srewatr, H. C. Hazelwood, (re.) J. R. Watkins, Z. Settles, H. G. Tandy, J. D. McLean, J. H. Smith, Wharton Golden, Mrs. T. G. Roach, D. D. Fields, W. H. Culton, J. A. Stevens, Ed Steffy, Bowman S. Gaines, Eph Lillard, Henry E. Youtsey, Ollie James, J. D. Black, J. C. Lackey, R. O. Armstrong, T. J. Nickel, Frank Rogers, J. F. Dailey, John Henry Wilson, Lee Armstrong, W. C. Harding, J. J. Reagan, Henry M. Bosworth, J. P. Chinn, Simeon Cook, Wharton Golden, (re.) and Robert Noaks; each of whom testified as appears by the transcript of said Walker official stenographer, and objections

629 were made, rulings given and exceptions reserved as appears by said transcript.

The Commonwealth then announced it was through with its evi-

dence, except as to one witness who the Commonwealth's attorney said was ill and not in condition to testify, and offered to introduce Dr. W. H. Kaufman, as to his condition and stated that the Commonwealth would ask to be allowed to introduce the witness Broughton at some subsequent stage of the trial, to which the defendant objected and moved the court to require the Commonwealth to conclude its testimony in chief before the defendant should be compelled to introduce his proof. To this the Commonwealth objected and the court stated he would dispose of the question when Broughton was offered as a witness by Comth, and same was overruled by the court, to which the defendant at the time excepted.

Thereupon the defendant introduced himself as a witness, Robert Noaks was recalled by defendant and McKinzie Todd also testified for defendant; and thereupon the Commonwealth was permitted, over the objection of defendant, to introduce Dr. W. H. Kaufman as to the condition of Henry Broughton, and the court having heard statement of Dr. Kaufman, as to the condition of Henry Broughton as shown by bill of evidence herein, Henry Broughton was permitted to testify on behalf of the Commonwealth and to the introduction of said witness Broughton at this point and to all of his evidence, the defendant objected and excepted; and thereafter the defendant introduced on his behalf the following witnesses:—W. R. Jewell, Max Louis, Ed Mentz, G. W. Prewitt, R. N. Miller, G. L. Roberts, D. C. Edwards, Ed Mentz, (re.) J. F. Taylor, E. U. Fordyce,

W. J. Deboe,  
Lilly Showalter,  
J. L. Butler,  
Annie Weist,  
G. L. Barnes,  
630 S. S. Shepard,  
Charles H. Gibson,

W. H. Culton (re.),

G. H. Gibson (re.),

C. C. Wallace,

T. D. Tinsley,

R. C. Kinkead,

W. C. Owens,

C. C. Mengel,

D. W. Gray,

J. R. Collier,

J. C. Owens,

John B. Mastin,

George A. Lewis,

Robert C. Blandford,

W. S. Taylor, whose testimony was presented by deposition.

H. H. Howard, Della B. Walcott, S. G. Sharp,

Della Walcott, (re.)

John B. Hurst,

F. Clay Elkins,  
 Beverly White,  
 Mattie Jones,  
 Lilly Jones,  
 James Sparks,  
 Henry Berry,  
 D. Gray Faulkner,  
 C. O. Reynolds,  
 John G. White,  
 W. H. Lilly,  
 W. J. Davidson, whose testimony was presented by deposition.  
 L. K. Rice,

631 R. L. McClure,  
 Harris Davis,  
 Frank Davis (excluded),  
 Charles Finley, whose testimony was presented by deposition.  
 Mrs. J. B. Mathews,  
 Mrs. J. T. Stamper,  
 J. M. Hardgrove,  
 Dr. P. E. James,  
 Will Lewis,  
 Fount Hayden,  
 John Perkins,  
 C. C. McDonald,  
 Milton Trosper,  
 Thomas McDonald,  
 Robert McDonald,  
 A. V. Hite,  
 Rolla Fanning,  
 W. H. Lilly, (re.)  
 James B. Howard,  
 W. L. Brown,  
 Harry Rogers,  
 Coley Crockett,  
 Ben Rowe,  
 J. G. Forester,  
 George S. Page,  
 John D. Feeney, and  
 Caleb Powers, (re.)  
 Otis Ashurst,

Said witnesses testified respectively as appears from the transcript of said Walker, stenographer, and objections were made, rulings given and exceptions reserved as appears from said transcript. The defendant then introduced and offered to read the act of the  
 632 General Assembly of the Commonwealth of Kentucky creating the Howard commission. To the introduction of said act of the legislature, the Commonwealth objected; the objection was sustained. To which the defendant, at the time, excepted; all of which appears by said transcript of the stenographer aforesaid.

The defendant then read from the affidavit for a continuance, the statements of the following witnesses:

George G. Fetter,  
J. A. Harkleroad,  
George W. Long,  
H. H. York,  
A. C. Foster,  
S. Van Zant,  
T. C. Davidson,  
Hop Donaldson,  
W. T. Short,  
C. W. Smith,  
Y. M. Higgins,  
W. McDonald,  
Walter R. Day,  
S. G. Price,  
J. C. Jones,  
Ellis Headley,  
Green Golden and

Ed Parker, as appears by the transcript of said Walker, stenographer, objections were made, ruling given and exceptions reserved in respect to said affidavit and the statements of said witnesses as appears by said transcript.

Thereupon the defendant rested, and the Commonwealth introduced as witnesses in its behalf in rebuttal.

J. N. Culton

J. R. Pflanz,

633 R. L. Page,  
Joseph Keyer,  
F. R. Carroll,

William Harding,  
James Sullivan,  
Miss Lizzie Woolums,  
R. S. Hearne,  
S. T. Pence,  
John Daughterty,  
Jim Walker,  
William Miller  
Clarence E. Walker,  
Wesley H. Whittaker,  
Eph Lillard,  
John Stewart  
W. L. Jett,  
Mace Williams,  
D. C. Richardson,  
Z. T. Thomason,  
Wingate Thompson,  
George B. Thompson,  
Caleb Powers

A. W. Morgan and

Emil Halde, who testified as appears by the transcript of said Walker, stenographer, and objections were made, rulings given and exceptions reserved in respect to the testimony of said witnesses as appears by said transcript.

Thereupon the defendant introduced as witnesses John G. White and F. M. Poor, who testified as appears by the transcript of said Walker, stenographer, and objections made, rulings given and exceptions reserved as to the evidence of said witnesses as appears by said transcript.

Thereupon the defendant rested and upon motion of the  
634 Commonwealth's attorney, the jury in charge of the judge of the court and the sheriff accompanied by the defendant and the counsel of the defendant and Commonwealth were taken to Frankfort to view the scene of the killing, and upon the return of the jury therefrom both sides rested. And the foregoing was all the evidence introduced before the court or jury by either party, and all the evidence that was offered upon the trial or heard; and all of said evidence appears from the transcript of Walker, the official stenographer, and is contained in eleven volumas numbered from one to eleven, inclusive, containing in all 2604 pages and are marked for identification, "Scott Circuit Court, Commonwealth of Kentucky, plaintiff, vs. Caleb Powers, defendant, third trial," and the number of the voluma. All of which said volumas and the contents thereof are referred to and made a part of this bill of exceptions. Thereupon the defendant moved the court to exclude from the consideration of the jury the evidence of any and all of the witnesses, who testified in the case relative to the movement and actions of the military or militia, except the acts of Governor Taylor in calling out the militia immediately after, or shortly after, the assassination of Mr. Goebel, and except the calling out of the small body of troops then in the arsenal. The Commonwealth objected to the motion. The court sustained the objection and refused to exclude the evidence as requested by the defendant. To which the defendant, at the time excepted and still excepts. The defendant also moved the court to exclude from the consideration of the jury the evidence of all witnesses relative to the gathering of the crowd of men at Frankfort and the declarations of the alleged co-conspirators of the defendant relative to said men that assembled at Frank-  
635-645 fort during the canvass of the vote of the election commissioners, and as to the gathering of witnesses who were subpoenaed, or called to Frankfort for the purpose of testifying before the contest board, and the evidence of all witnesses and the declarations of all the alleged co-conspirators of the defendant in respect to the meeting at the secretary of state's private office and at the agricultural building. The Commonwealth objected to the motion and the court sustained the objection and refused to exclude the evidence indicated, or any part thereof from the consideration of the jury.

To which the defendant, at the time, by counsel excepted and still excepts.

Thereupon the defendant moved the court to instruct the jury as follows:—

\* \* \* \* \*

646 To the giving of said instructions, the defendant, at the time, objected, and objected to the giving of any of said instructions to the jury. The court overruled the defendant's objections and gave to the jury said instructions as above stated. To which ruling of the court, the defendant, at the time, excepted and still excepts.

The foregoing instructions offered by the defendant and those given by the court, as aforesaid, were all the instructions asked for, offered, given or refused.

Thereupon the case was argued by counsel for plaintiff and defendant; and, in the course of his argument, Hon. T. C. Campbell, one of the counsel for the Commonwealth, made to the jury the following statement, viz: "Jim Howard was not hung, but eleven

647 of the twelve jurors who tried him were in favor of hanging him, and one was for life imprisonment and eleven had to come to one." To which statement the defendant at the time objected on the ground that it was not based upon any evidence introduced in the case and moved the court to exclude same from the consideration of the jury, which objection and motion were overruled by the court, to which defendant at the time excepted and still excepts.

Thereupon, after argument by counsel, the cause was submitted to the jury and afterwards the jury returned into court a verdict finding the defendant guilty and fixing his punishment at death. Thereupon the defendant moved the court to grant him a new trial and filed grounds therefor, which said motion and grounds for a new trial are in words and figures as follows, to-wit:—

And, at said time, the defendant moved the court to postpone the hearing of his motion for a new trial, and that he be allowed further time to prepare and file additional grounds for a new trial, and, in support of said motion, filed his affidavit, which is in words and figures as follows, to-wit:

(Here copy affidavit of Caleb Powers filed and noted August 29", 1903.)

648 The court overruled the defendant's motion to postpone action on the motion for a new trial and for time to prepare and file additional grounds. To which ruling of the court the defendant at the time, excepted and still excepts. Thereupon the court overruled the defendant's motion for a new trial, to which ruling defendant, at the time excepted and still excepts.

The defendant being present in court, and the court being about to adjourn for the term the court was about to pass sentence upon the defendant when the defendant, by counsel, objected on the grounds



that two days had not elapsed after the verdict; and also moved the court to defer his sentence for some days to enable him to prepare and present in due form other additional grounds for a new trial and, in support thereof, filed the affidavit last above mentioned.

The court after hearing, overruled the defendant's motion to defer sentence and to extend the time for preparing and filing additional grounds for a new trial, to which the defendant, at the time, excepted and still excepts.

The court by order, after passing sentence upon the defendant, granted the defendant time to prepare and present his bill of exceptions in this case until the 8<sup>th</sup> day of October, 1903, being the fourth day of the next October term of Scott circuit court; upon which said October 8<sup>th</sup>, 1903, the defendant moved the court to set aside the order overruling his motion for a new trial made at the last term of the court and offered to file his own affidavit and the affidavits of W. H. Wood, R. A. Rose, Lee Deavers, Will Barnes and W. H. White, in support of his said motion. The court over-ruled said motion and refused to permit said affidavits to be filed. To which ruling of the court the defendant excepted and still excepts  
649 and thereupon tendered his bill of exceptions making said affidavits a part of the record which is in words and figures as follows, to-wit:—

(Here copy bill of exceptions making said affidavits a part of the record.)

Thereupon the defendant tendered this his bill of exceptions  
650 which is approved by the judge and by him signed and made a part of the record of this cause.

J. E. ROBBINS, Judge.

651

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit.
vs.	
CALEB POWERS, Defendant.	

The defendant, Caleb Powers, states that his motion for a new trial in this cause was overruled by the court on the afternoon or evening of Saturday, August 29<sup>th</sup>, 1903, and the jury which tried him were discharged only some few hours before his motion for a new trial was overruled by the court. That from the time the verdict was returned into court by the jury and until he filed his motion and grounds for a new trial, his counsel were continuously engaged in the preparation of his motion and grounds for a new trial, and had no opportunity to confer with any of the jurors who tried the cause and ascertain from the facts hereinafter stated.

After his motion for a new trial was overruled and the court had passed sentence upon him, he was advised that the jurors who tried him had obligated themselves to each other not to reveal or disclose

ought that occurred or happened in the jury room, during the progress of his trial; but he says one of the said jurors who tried him, J. H. Wilson, a resident of Bourbon county, made a visit to the city of Lexington on the afternoon and evening of August 29", 1903, and while in the city of Lexington made the following statements.

"I am unable to give any of the details how the fire was attempted to be started because I was locked up inside the house and was in charge of the sheriff. We were informed of what had taken place and the sheriff was notified. On further investigation being made sufficient grounds were discovered to justify him in placing  
652 Deputy Sheriff Robinson with a picket to surround the building and guard it until we were liberated." And said Wilson further stated that he was advised that there had been four distinct efforts to fire the house in which the jury was confined and while they were confined therein.

The defendant states that said statement of said Wilson was reported and published on the morning of August 30", 1903, in the Morning Democrat, a newspaper published in the city of Lexington, and said publication was the first intimation he had received that there had been any attempt to injure or assault the jury that tried him as set forth in the statement of said Wilson. He says immediately upon said statement of said Wilson becoming public, there was great indignation and feeling developed throughout the country, in respect to the alleged treatment of said jury, which tried him and the impression was attempted to be made through the columns of the Democrat, the newspaper aforesaid, that those interested in his, defendant's behalf and his friends had attempted the dastardly crime stated by said Wilson to have been attempted against the lives and persons of the jurors which tried him. He says he has been unable to secure a verification of the statement of said Wilson by other jurors, and he is advised and informed that said jurors decline to speak or to make any statement relative to the matters disclosed by said J. H. Wilson, juror as aforesaid; but said jurors if brought into court upon their oaths, this affiant states will disclose in full and in detail the crime attempted against them as detailed to them and related to them by the officers in whose charge they were placed under the orders of this court. The affiant states that with a summary process of this court to secure the presence of said jurors in this court and said jurors being

required to testify, it will either appear that there was  
653 an attempt to commit a crime against the persons and lives of said jurors, or else there was detailed or related to said jurors a state of fact which authorized J. H. Wilson, the juror aforesaid, in making the statement already set forth. The affiant states if there was any attempt upon the life of said jurors, or any attempt to injure their persons, he has no knowledge or information relative thereto, except as derived from the statement of the juror, Wilson, as aforesaid; but he states that he believes and

charges that a matter of fact, the jurors that tried him were affected with sinister influence to his prejudice and to his injury, by reason of the transactions actually occurring as stated by said Wilson or the transactions as reported by those in charge of the jury to said juror, Wilson, and other jurors as aforesaid; and he states and charges that he believes the verdict was rendered against him by said jury through passion and resentment, growing out of the circumstances and facts related by the juror Wilson, as aforesaid.

He says that it is improbable, it not impossible, that four separate attempts against the life of the jury could have been made without in some way the jurors, through those in charge of the jury, receiving knowledge or information of such efforts; and he states further in support of his motion to set aside the order overruling his motion for a new trial, that it was impossible for him to have presented the facts herein stated to this court by the exercise of all diligence, before this court overruled his motion for a new trial, and that said facts above stated were not known to him or communicated to him until after this court adjourned on August 29<sup>th</sup>, 1903, and in further support of his motion he states that since the adjournment of this court Aug. 29<sup>th</sup>, 1903, he has been advised that John

654 A. Wilson, James L. Hill, Perry Rice and Ed Wades members of the jury that tried him had before being accepted as jurors to try him, had expressed and did entertain to the defendant a feeling of malignant hatred and prejudice and he files with this his affidavit disclosing the condition of mind of said witnesses the affidavit of R. A. Rose, W. A. Barnes, Lee Beaver and W. W. Wood, and W. H. White. The defendant states that he could not by the exercise of any diligence have ascertained and presented to this court the information furnished by the affiants aforesaid before his motion for a new trial had been overruled by this court and that the information desired by him as aforesaid came to him since the adjournment of this court on the afternoon of Aug. 29<sup>th</sup>, 1903.

CALEB POWERS.

Subscribed and sworn to by Caleb Powers before me this 8<sup>th</sup> day of October, 1903.

JAMES B. FINNELL,  
Examiner for Scott County, Kentucky.

655 STATE OF KENTUCKY, }  
Bourbon County, } *set* :

Affiant, William H. Wood, states that he is a resident of Paris, Bourbon county, Kentucky, and that he has personally known for twenty years, one Perry Rice, who was a juror in the trial of Caleb Powers which was begun and held at Georgetown, Kentucky, on August 3<sup>rd</sup>, 1903; that he has talked with said Rice at different times upon the subject of the trials of those men charged with complicity

in the assassination of the late William Goebel, deceased ; that shortly after the second trial of Caleb Powers upon said charge, affiant had a conversation with said Rice at the home of affiant, and at that time the said Rice expressed himself as follows, in reply to affiant's statement that the guilty should be punished, but that no innocent man should suffer for it, to-wit:—Rice said in substance, "Damn him, he did not get what he deserved. He ought to have been hung," referring to the sentence of life imprisonment. A short time thereafter, affiant met the said Rice on the streets of Paris, in front of Winn and Lowry's hardware store, and the said Rice expressed the same opinion, in substance, and said that all of the men now implicated, or charged with complicity in the said assassination of Goebel ought to be hung, naming Powers among the number.

W. H. WOOD.

Subscribed and sworn to be William H. Wood before me this 3<sup>d</sup> day of October, 1903.

MARY T. KENNEY,  
Notary Public, Bourbon County, Ky.

My commission expires Feb. 8<sup>th</sup>, '06.

656 STATE OF KENTUCKY, }  
Bourbon County, } *set* :

Affiant, Robert Rose, states that he has resided in Paris, Bourbon county, Kentucky, for some years, and is now in the employ of the Adams Express Company in said city ; that he has known for some years James T. Hill, who served upon the jury in the trial of the case of *The Commonwealth of Kentucky vs. Caleb Powers*, presided over by the Honorable Joseph E. Robbins, special judge of the Scott circuit court ; that after the first trial of said Powers under the same indictment in said court, the said Hill said to affiant, that "the punishment was not enough ; that Powers was guilty and ought to be hung ;" that about one year ago on the Bishop Hibler farm, Bourbon county, the said Hill said to this affiant in substance, that "all parties accused of a conspiracy to assassinate Goebel were guilty and ought to be hung ;" that said Hill mentioned the names of some of those so accused and the name of Caleb Powers was so mentioned by him as one who ought to be hung.

Affiant says that he has known for some years one Perry Rice, who served as a juror upon the trial of said case ; that sometime before said trial, said Rice said to affiant, in the fall of 1902 in Paris, Kentucky in substance, "They have got the right parties who killed Goebel, and all of them ought to be hung ;" that since the last trial of said Powers, the said Perry Rice said to affiant on the street in front of the Fordham hotel, Paris, Kentucky, "that he wished all of

them had been tried, so that he could have hung them all, meaning every one implicated in the alleged conspiracy to kill said Goebel.

R. A. ROSE.

657 Subscribed and sworn to by Robert Rose before me this 26<sup>th</sup> day of September, 1903.

CLIFTON ARNSPARGER,  
Notary Public, Bourbon County, Kentucky.

My commission expires January 12<sup>th</sup>, 1904.

658 STATE OF KENTUCKY, {  
Bourbon County. }

Affiant, Lee Devers, states that he is a resident of Bourbon county, Kentucky, and has been personally acquainted for the past six years, with James T. Hill, who served upon the jury in the case of the Commonwealth of Kentucky vs. Caleb Powers, which was begun and held in Georgetown, Kentucky, on the 3<sup>rd</sup> day of August, 1903; that in a conversation with said Hill and others, during the harvesting season in 1902, when they were both working in said harvest on the Hibler farm, near Paris, Kentucky, the matter of the trial of those suspected of complicity in the assassination of William Goebel came up and said Hill expressed himself in substance as follows, to-wit:—That "the whole dad-blamed ship's crew of them were guilty."

LEE DEVERS.

Subscribed and sworn to by Lee Devers, before me this 5<sup>th</sup> day of October, 1903.

JOHN M. BRENNAN,  
Notary Public in and for Bourbon County, Ky.

My commission will expire January 19<sup>th</sup>, 1904.

659 The affiant, William A. Barnes, says that he is fifty one years of age, and that he was born on the 1<sup>st</sup> day of February 1852, in Harrison county, Kentucky, near Claysville that county, and that he lived in Harrison county continually until about nine years ago when he moved to Bourbon county, Kentucky, near the town of Shawhan on the Louisville and Nashville railroad, and that he lives on the farm of John G. Montgomery which is about one and one half miles west of the said town of Shawhan, and near the Mt. Carmel Christian church, and that his postoffice address is Cynthia, Harrison county, on rural route, No. 9.

That he is well acquainted with John Wilson who was a juror in the late case of the Commonwealth of Kentucky vs. Caleb Powers, which case was recently tried in the Scott county circuit court, at Georgetown, Kentucky, and which trial was presided over by the

Hon. Joseph E. Robbins, of Mayfield, Kentucky. That John Wilson lives in Shawhan, Bourbon county Kentucky, and has lived there for a number of years past; that while the said John Wilson was talking to this affiant in front of Dick Doty's blacksmith shop in Shawhan, Kentucky about a year ago, he, the said John Wilson, said to this affiant, that "the last one of the men who had been indicted by the grand jury for the assassination of William Goebel ought to be hung." At the time of the saying of this speech by the said John Wilson, no one else was present, or heard the said speech on the part of Wilson, and affiant further says that Wilson knows that he did make said speech at the time referred to.

Affiant further states that while the said Caleb Powers was being tried at Georgetown, Kentucky, before the said Judge Joseph E.

Robbins that he, this affiant, went to the home of Charlie  
660 Wilson, who lives about a mile west of Shawhan and near the affiant, to return some borrowed tools and to pay for some wire owing to the said Charley Wilson by said affiant, and that in a conversation with the said Charlie Wilson this affiant said to him "Charlie, Johnny ought not to have set on that jury in the Caleb Powers case, as I have heard him say that he would hang the last one of those men indicted." And Charlie said to me, "Well, I felt as if I could not set on the case, as I was prejudiced in the matter against Powers." Affiant further says that the said Charley Wilson was summoned over to Georgetown as a juror in the case of The Commonwealth of Kentucky vs. Caleb Powers, and did not qualify as a juror. Charley further said to me in this conversation, that he told the attorneys, "that he could not give Powers justice, and therefore would not set on the case."

Affiant further says that as far as he knows this was all that was said in the case at the home of Charley Wilson.

W. A. BARNES.

Subscribed and sworn to before me by William A. Barnes this the 12<sup>th</sup> day of September, 1903.

R. H. CONWAY,  
Notary Public, Harrison County, Kentucky.

My commission expires Feb'y 13<sup>th</sup>, 1906.

661

Scott Circuit Court.

THE COMMONWEALTH OF KENTUCKY	}	Affidavit.
vs.		
CALEB POWERS.		

The affiant, W. H. White, states that he has known Ed Ingels, who was one of the jurors in the above styled case at the recent special term of the Scott county court, for more than twenty years



and that shortly after the assassination of William Goebel, he heard the said Ed Ingels say that Taylor and all of them ought to be hung for murdering Goebel. That said remark was made in the city of Paris, Kentucky, on Main street near the corner of Third, and that it was on a court day, but in which month affiant is not positive.

W. H. WHITE.

Subscribed and sworn to before me by W. H. White, this 7<sup>th</sup> day of October, 1903.

JOHN M. BRENNAN,  
Notary Public in and for Bourbon Co., Ky.

My commission will expire January 19<sup>th</sup>, 1904.

662

Scott Circuit Court.

COMMONWEALTH OF KENTUCKY	}	Bill of Exceptions.
vs.		
CALEB POWERS.		

Be it remembered that upon the trial of the motion entered by the defendant in this cause on the 8<sup>th</sup> of October, 1903, the defendant offered to file the affidavits of himself, W. H. Wood, R. A. Rose, Lee Deavers, W. A. Barnes, and W. H. White, which said affidavits are in words as follows :—(Here copy affidavit of Caleb Powers, W. H. Wood, R. A. Rose, Lee Deavers W. A. Barnes and W. H. White.) The court refused to allow said affidavits to be filed to which the defendant excepted and therein tendered this his bill of exceptions as part of the record of this cause, which is now signed and made a part of the record in this cause.

J. E. ROBBINS, Judge.

663    STATE OF KENTUCKY, }  
          Scott County,        } *set* :

I, George S. Robinson, clerk of the Scott circuit court do hereby certify that the foregoing 540 pages together with the 141 pages heretofore copied and certified on the — day of May, 1905, contain a full true and correct transcript of the record in the case of The Commonwealth of Kentucky against Caleb Powers in the said court excepting the daily orders convening and adjourning the said court and the adjourning of the jury from day to day, excepting the bills of exceptions and transcript of the testimony filed in the cause upon the different trials of said case and excepting orders of attachments and subpoenas for witnesses.

In testimony whereof I hereunto affix my hand and seal of said court this June 2<sup>nd</sup>, 1905.

[SEAL.]

GEO. S. ROBINSON, C. S. C. C.

664 On a day following to-wit:—June 8", 1905, an order was made and entered herein, said order was and is in words and figures following, to-wit:—

May Term, Thursday June 8", A. D. 1905.

COMMONWEALTH OF KENTUCKY }  
 vs.  
 CALEB POWERS. }

This day came the defendant by counsel and tendered and offered to file certain affidavits, to-wit:—Affidavits of Chas. Emory Smith, John W. Davis, Jos. K. Dixon, Wm. S. Taylor, J. W. Pruett and J. W. Griggs.

Came the plaintiff by counsel and objected to the filing of said affidavits. The court not being fully advised, takes time, said affidavit is endorsed "tendered" and the motion to file said is submitted.

On the same day, to-wit, June 8", 1905, the affidavits referred to in the foregoing order, being affidavits of Chas. Emory Smith, John W. Davis, Jos. K. Dixon, Wm. S. Taylor, J. W. Pruett and J. W. Griggs, were "tendered" herein, said affidavits being in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs.  
 CALEB POWERS, Defendant. }

The affiant, Charles Emory Smith, states that he was Postmaster General under the administration of President McKinley through the year of 1900; that on the 28" of February, 1900, 665 a telegram was received by the affiant from Holmes, postmaster at Frankfort, Kentucky, of which a copy is hereto attached, which related to distribution of mail addressed to officials of the State of Kentucky; that upon the receipt of said telegram the affiant conferred with President McKinley and by direction of the President, in consultation with the Attorney General, the reply was sent of which a copy is hereto attached.

CHAS. EMORY SMITH.

Subscribed and sworn to, before me, by Charles Emory Smith this 27" day of May, 1905.

WILLIAM C. STOEVEER,  
 Notary Public.

[SEAL.]

Commission expires January 19", 1907.

TREASURY DEPARTMENT,  
OFFICE OF THE AUDITOR FOR THE  
POST OFFICE DEPARTMENT.

I, J. J. McCurdy, auditor for the Post Office Department do hereby certify the annexed to be a true and correct copy of a carbon copy of a telegram attached to the account of the disbursing clerk of the Post Office Department, under date of February 28<sup>th</sup>, 1900, and for which telegram credit was claimed for payment to the Postal Telegraph-Cable Company.

[SEAL.] In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this tenth day of February, in the year of our Lord nineteen hundred and five.

J. J. McCARDY,  
Auditor for the Post Office Department.  
C. A. K.

(See R. S., sec. 889, and sec. 3 of the act approved July 31<sup>st</sup>, 1894, 28 Stats. L., 205.)

666

41 Collect Gov't.

Office at Main Entrance City Post Office.

FRANKFORT, KY., Feb. 28<sup>th</sup>.

Postmaster General, Washington, D. C.:

The State contest board has given certificates to the Democratic contestants who are demanding all mail addressed to State officials while Republicans hold the offices and claim the mail. What shall I do?

HOLMES,  
Postmaster.

POST OFFICE DEPARTMENT,  
WASHINGTON, D. C., Feb. 8<sup>th</sup>, 1905.

R. J. Wynne, Postmaster General of the United States of America, certify that the annexed is a true copy of the original telegram as appears from records in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the city of Washington, the day and year above written.

[SEAL.]

R. J. WYNNE,  
Postmaster General.  
M. O. C.

(Telegram.)

Office of the Postmaster General.

WASHINGTON, D. C., February 28<sup>th</sup>, 1900.

Holmes, postmaster, Frankfort, Ky.:

Replying to your telegram of this date, mail addressed to official persons by name is to be delivered to the persons named. Mail addressed to State officers, without designation by name, is to be delivered to the actual incumbents of the offices. The mere fact that contest board has given certificate to contestants will not justify delivery of mail of latter class to them until they are lawfully inducted into office. This reply is based upon your statement that contestees still hold the offices.

CH. EMORY SMITH,  
Postmaster General.

In the Circuit Court of the United States for the Eastern District of  
Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit of John W. Davis.
vs. CALEB POWERS, Defendant.	

STATE OF KENTUCKY, }  
County of Jefferson, } ss:

The affiant, John W. Davis, states that during the months of January, February and up to and including the 10<sup>th</sup> day of March, 1900, he was employed as policeman or watchman at the State House grounds in the city of Frankfort, Kentucky, upon which grounds was situated the building known as the Executive building, in which building was the office of the governor of Kentucky and in which were kept the archives, books, records and other papers pertaining to said office of governor, and in which building were also the other executive offices of said State, to-wit:—secretary of state, commissioner of insurance and others; that his duties as such policeman required him to be constantly upon said grounds and in said buildings thereon. He states that on and from and after the 12<sup>th</sup> day of December, 1899, upon which date William S. Taylor was inaugurated as the governor of the State of Kentucky, the said William S. Taylor from said date and so long as this affiant remained said officer, to-wit:—up to and including the 10<sup>th</sup> day of March, 1900, occupied and was in actual physical possession of the executive offices provided for and set apart for and used by the governor of the State of Kentucky on said state house grounds and in said executive building, and during all

of said times continuously acted as the governor of the State of Kentucky and performed the duties of said office and was so acting and performing said duties on the 10<sup>th</sup> day of March, 1900, at the time he, the said William S. Taylor, granted and delivered to Caleb Powers a pardon for the offense charged against the said Powers herein, to-wit:—the offense of being accessory before the fact to the wilful murder of William Goebel; and he further states that on, from and after said December 12<sup>th</sup>, 1899, up to and including the 10<sup>th</sup> day of March, 1900, the said William S. Taylor was in actual possession of the executive mansion provided by the State of Kentucky for its governor and in possession of all books, papers, records and archives belonging and pertaining to said office.

Affiant further states that at no time after the said Taylor was inaugurated as governor of Kentucky, to-wit:—on the 12<sup>th</sup> day of December, 1899, and up to and including the 10<sup>th</sup> day of March, 1900, did any other person than said William S. Taylor occupy or was any other person in possession of said executive offices of buildings provided by the State of Kentucky for its governor or of the records, books, papers or archives pertaining to said office.

This affiant further states that it was a part of his duties to obtain from the United States post master at Frankfort, Kentucky, the mail to be delivered to the State officials and occupants of said executive buildings and deliver the same to the persons to whom said  
669 mail was addressed. He states that for several days prior to the 28<sup>th</sup> day of February, 1900, the post master at Frankfort refused to deliver to any one the mail addressed to the State officials of Kentucky residing at Frankfort, Kentucky, and that this affiant is informed and believes that said refusal on the part of the post master to deliver said mail was due to the fact that persons other than the State officials who occupied said executive building were claiming said mail as such officers; but that on the said 28<sup>th</sup> day of February, 1900, and subsequent thereto, and so long as this affiant remained as said police officer or watchman at said executive building, the said post master at Frankfort delivered to this affiant, that he might deliver the same to the occupants of said executive building all mail addressed to State officials by their official title and not by name, and that said mail was so delivered by this affiant to said State officials in said executive building, including William S. Taylor, to whom was delivered all mail addressed to the governor of Kentucky by title rather than by name; and that all mail addressed to State officials, including said William S. Taylor, which was addressed by name and title was delivered to the person to whom it was addressed by this affiant; and that mail addressed to the governor of Kentucky without designation by name, and mail addressed to William S. Taylor as the governor of Kentucky was being so delivered to said William S. Taylor on the 10<sup>th</sup> day of March, 1900.

JOHN W. DAVIS.

Subscribed and sworn to before me by John W. Davis this 5<sup>th</sup> day of June, 1905.

My commission expires January 15<sup>th</sup>, 1908.

[SEAL.]

M. W. BEARD,  
Notary Public, Jefferson County, Ky.

670 In the Circuit Court of the United States for the Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiff,	{	Affidavit of Joseph K. Dixon.
vs.		
CALEB POWERS, Defendant.		

STATE OF KENTUCKY, } ss:  
County of Jefferson, }

The affiant, Joseph K. Dixon, states that during the month of December, 1899, and the months of January, February, March, April and the first 21 days of May, 1900, he was the assistant adjutant general of the State of Kentucky with headquarters at Frankfort, Kentucky, and that the adjutant general of the State during all of said time was D. R. Collier, now deceased.

He states that just prior to February 28<sup>th</sup>, 1900, and for a few days before that date, the United States post master at Frankfort, Kentucky, refused to deliver mail coming through the United States post office at Frankfort to the adjutant general and other State officials where the mail was addressed to said officials by their official title rather than by name, and that on or about February 28<sup>th</sup>, 1900, the said post master at Frankfort, Kentucky, S. B. Holmes, now deceased, acting under the instructions and the authority of the Postmaster General of the United States, delivered to this affiant all of such accumulated mail addressed to the "adjutant general" of Kentucky at Frankfort, or mail similarly addressed without naming the official by his actual name; and that said post master from said date, to-wit:—from February 28<sup>th</sup>, 1900, continued to deliver mail so addressed to D. R. Collier the adjutant general of the State of

671 Kentucky at Frankfort, so long as the said Collier remained in said office, to-wit:—up to and including the 21<sup>st</sup> day of May, 1900.

The affiant further states that he was in the city of Frankfort, Kentucky, continuously from the date of the inauguration of William S. Taylor as the governor of Kentucky, on December 12<sup>th</sup>, 1899, up to and including the 21<sup>st</sup> day of May, 1900, and that during all of said time said William S. Taylor continuously acted as the governor of the State of Kentucky, and had in his possession and under his control that portion of the executive building provided by the State of Kentucky for the governor, the executive mansion provided by the State of Kentucky as the residence of its governor, and all the



books, archives, records, papers and documents pertaining to the office of governor of the State of Kentucky, and that at no time between said dates did any one other than the said William S. Taylor occupy as the governor the said executive building or the executive mansion, or have control, custody, or possession thereof, or the control, custody or possession of said books, archives, records, papers and documents pertaining to said office, and that said Taylor was so actually performing the duties of governor and was in such possession on the 10<sup>th</sup> day of March, 1900, and during all of said day, upon which date he granted the defendant Caleb Powers the pardon set out and mentioned by said Caleb Powers in his petition for removal herein; that he personally saw said William S. Taylor on said date in said executive building deliver said pardon to said Caleb Powers and personally saw said Caleb Powers accept from said William S. Taylor, as the governor of Kentucky, said certificate of pardon; and that he, this affiant, as the acting adjutant general of the State of Kentucky on said date, recognized and honored said pardon as the act and deed of the governor of Kentucky.

672 Joseph K. Dixon says the statements of the foregoing affidavit are true as he believes.

JOSEPH K. DIXON.

Subscribed and sworn to before me by Joseph K. Dixon this June 7<sup>th</sup>, 1905.

My commission expires January 15<sup>th</sup>, 1908.

M. W. BEARD,

Notary Public, Jefferson County, Kentucky.

In the Circuit Court of the United States for the Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiff,	} Affidavit of William S. Taylor.
vs. CALEB POWERS, Defendant.	

STATE OF INDIANA, }  
County of Madison, } ss:

The affiant, William S. Taylor, says that at all the times hereinafter mentioned he was over the age of thirty (30) years and had been a citizen and a resident of the State of Kentucky for more than six years preceding his election as governor of Kentucky as hereinafter shown; that at the election held in the State of Kentucky in November, 1899, for the office of governor, lieutenant governor, secretary of state and other State officers, he was a candidate in said State for the office of governor thereof, and that at said election he received the highest number of votes cast in said State for the said office of governor of said State, and was elected to said office of governor of

said State for the term of four years from the fifth Tuesday succeeding his election, to-wit:—the 12<sup>th</sup> day of December, 1899; that after said election the State board of election commissioners of said

673 State of Kentucky, which was the duly and only constituted and acting authority under the laws of the State of Kentucky so to do, signed, granted, issued and delivered to him, this affiant, as required by law, a certificate wherein they certified that at said election he, this affiant, was elected governor of said State. Said certificate is now in the possession of this affiant and a copy thereof is now hereto attached marked "A" for identification. That on the same day, to-wit, December 9<sup>th</sup>, 1899, the then acting and duly elected governor of Kentucky, William O. Bradley, who had theretofore been duly elected governor of Kentucky in 1895, and continued in office as such governor until the 12<sup>th</sup> day of December, 1899, granted, issued and delivered to him, this affiant, a commission, which commission was duly signed by the said William O. Bradley, as governor, and Charles Finley, secretary of state, with the seal of the Commonwealth attached thereto. Said commission is now in the possession of this affiant, and a copy thereof is now hereto attached, marked "B" for identification. That thereafter, to-wit:—on the 12<sup>th</sup> day of December, 1899, he took the oath of office prescribed by the laws of the State of Kentucky and qualified as such governor as required under the laws of the said State of Kentucky, and on said day he commenced the execution of the duties of his said office and continued always in the execution thereof until the 21<sup>st</sup> day of May, 1900; that on the 10<sup>th</sup> day of March, 1900, as the governor of Kentucky, he granted and delivered to the defendant, Caleb Powers, a full, complete, absolute and unconditional pardon for the offense of which the defendant, Caleb Powers, now stands indicted herein, to-wit:—the offense of being accessory before the fact to the wilful murder of William Goebel; that said pardon was granted, issued and delivered by this affiant to the said

674 Caleb Powers in person in the building set apart for the purpose, and occupied by the governor of the State of Kentucky, in the city of Frankfort, Kentucky, and that at the time said pardon was granted, issued and delivered to said Powers, this affiant was duly and legally elected, qualified, actual and acting governor of the State of Kentucky, and was in actual possession of the executive mansion, executive offices, and buildings provided by the State of Kentucky for its governor, and in possession of all books, papers, records and archives belonging and pertaining to said office, and performing the duties thereof; and that he had been such governor and in such possession from the 12<sup>th</sup> day of December, 1899, as heretofore stated, and continued in such possession until the 21<sup>st</sup> day of May, 1900, and that at said time, and between said dates, no other person than this affiant, was, or had been subsequent to said December 12<sup>th</sup>, 1899, in possession of said executive offices or the buildings provided by the State of Kentucky, for its governor, or of the records, books, papers or archives pertaining to said office. This affiant

further states that at the time the said pardon was granted by this affiant as governor of Kentucky to the said Caleb Powers, and subsequent thereto, he, this affiant, William S. Taylor, was, and prior thereto had been, recognized, regarded and treated as the duly elected, actual and acting governor of the State of Kentucky by the executive powers and the executive departments of the United States Government, including the President and the Postmaster General, and by the post master of Frankfort, Kentucky: and that said official recognition by said Chief Executive and the political departments of the United States was had after it was claimed that the contest for said office of governor, which had been pending  
675 in the General Assembly of the Commonwealth of Kentucky between William Goebel, contestant, and this affiant, contestee, had been acted upon and determined, and that said recognition consisted in part by the then President of the United States, William McKinley, on the 2<sup>nd</sup> day of February, 1900, addressing and sending to this affiant as the governor of Kentucky a telegraphic message, the original of which as received by this affiant is now in possession of this affiant and a copy of which is hereto attached as a part hereof marked "C" for identification; and further by the then Postmaster General of the United States, Charles Emory Smith, on February 28<sup>th</sup>, 1900, addressing and sending to the post master at Frankfort, Kentucky, a telegraphic message ordering said post master at Frankfort, to deliver mail addressed to State officers without designation by name to the actual incumbents of the offices, without regard to the fact that the contest board had given a certificate of election to the contestants for the said State offices.

This affiant further says that in pursuance of the said order of Charles Emory Smith, Postmaster General of the United States, all mail addressed to the governor of Kentucky without designation by name was, after said February 28<sup>th</sup>, 1900, as it had been prior thereto, and as long as this affiant remained in physical possession of said offices, books, papers and archives, as hereinbefore mentioned, delivered by said post master at Frankfort, Kentucky, by this affiant, and said mail was being so delivered to this affiant on the day said pardon was granted to said defendant, Caleb Powers.

This affiant further states that from the 12<sup>th</sup> day of December, 1899, up to the 21<sup>st</sup> day of May, 1900, he continued to hold such possession and to exercise the duties of said office of governor uninterruptedly, as hereinbefore shown, and that on the 21<sup>st</sup> day  
676 of May, 1900, and not until after the Supreme Court of the United States has decided that it had no jurisdiction to hear or determine the action which had been brought against this affiant by one J. C. W. Beckham, claiming said office of governor, did he, the affiant, surrender said office or the possession of said buildings, books, archives, records, or other property pertaining to the said office of governor of Kentucky, or cease to act as such governor.

WILLIAM S. TAYLOR.

UNITED STATES OF AMERICA, }  
 District and State of Indiana, } ss :

Before the undersigned a United States commissioner, within and for said district, personally came William S. Taylor who subscribed the foregoing affidavit and upon his oath declared that the matters and things therein set forth are true.

Witness my hand and official seal this second day of June, 1905.

CHARLES W. MOORES,  
 U. S. Commissioner.

[SEAL.]

"A."

COMMONWEALTH OF KENTUCKY :

FRANKFORT, Dec. 9<sup>th</sup>, 1899.

The undersigned, a board for examining and canvassing the returns of an election held on Tuesday, the 7<sup>th</sup> of November, 1899, for governor of the State of Kentucky, do certify, that William S. Taylor received the highest number of the votes given for that office, as certified to the secretary of state, and is, therefore, duly and regularly elected for the term prescribed by the constitution.

WILLIAM S. PRYOR, Chairman,  
 W. T. ELLIS, Member,  
 ———, Member,

677

State Board of Election Commissioners  
 for the Commonwealth of Kentucky.

Attest:—

C. P. CHENAULT,  
 Secretary State Board of Elections Commissioners.

A copy

Compared by me with the original document.

[SEAL.]

CHARLES W. MOORES, U. S. Com'r.

"B."

In the name and by the authority of the Commonwealth of Kentucky, William O. Bradley, governor of said Commonwealth, to all to whom these presents shall come, Greeting :

Know ye, that William S. Taylor having been duly elected governor of the Commonwealth of Kentucky, I hereby invest him with full power and authority to execute and discharge the duties of the said office according to law : and to have and to hold the same with all the rights and emoluments thereunto legally appertaining for and during the term prescribed by law.

In testimony whereof, I have caused these letters to be made pat-

ent, and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 9<sup>th</sup> day of December in the year of our Lord, one thousand eight hundred and ninety nine and in the one hundred and eighth year of the Commonwealth.

WILLIAM O. BRADLEY.

By the governor :

[SEAL.] CHARLES FINLEY,  
Secretary of State,

678 By — — —,  
Assostant Sect. of State.

A copy.

Compared by me with the original document.

CHARLES W. MOORES,  
U. S. Com'r.

[SEAL.]

"C."

Western Union Telegraph Company.

WASHINGTON, D. C., Feb. 2<sup>nd</sup>, 1900.

To 145 paid. Government Executive Mansion.

Governor W. S. Taylor, Frankfort, Ky. :

Replying to your telegram of first inst., I call your attention to sec. 5297 Revised Statutes of the United States which provides as follows:— In case of an insurrection in any State, against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive when the legislature cannot be convened, to call forth such number of the militia of any other State or States which may be applied for as he deems sufficient to suppress such insurrection, or on like application to employ, for the same purposes such part of the land or naval forces of the United States as he deems necessary. The facts stated in your telegram are not such as under the Constitution and laws authorize Federal interference.

WILLIAM MCKINLEY.

A copy.

Compared by me with original.

CHARLES W. MOORES,  
U. S. Com'r.

[SEAL.]

679 UNITED STATES OF AMERICA, {  
Indianapolis, Ind. }

I, Charles W. Moores, United States commissioner, do hereby certify that I have compared the foregoing copies, namely, the copy of the certificate of election issued by William S. Pryor and W. T. Ellis, December 9<sup>th</sup>, 1899, to William S. Taylor and the commission issued by William O. Braeley, governor, and Chas. Finley, secretary

of state, to said William S. Taylor and a telegram of date Feb. 2", 1900, to said Taylor from William McKinley with the originals and find the copies marked respectively, "A," "B," and "C," and attached to the affidavit of William S. Taylor in the case of The Commonwealth of Kentucky *vs.* Caleb Powers to be an exact copy of the original.

Given under my hand and seal of office this June 2", 1905.

CHARLES W. MOORES,  
United States Commissioner.

[SEAL.]

In the Circuit Court of the United States for the Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY,	}	Affidavit of J. W. Pruett.
Plaintiff,		
<i>vs.</i>		
CALEB POWERS, Defendant.		

STATE OF KENTUCKY, } ss:  
County of Jefferson, }

The affiant, J. W. Pruett, states that during the months of January, February, March, April and May, 1900, and prior and subsequent thereto, he was the assistant United States postmaster in the city of Frankfort, Kentucky; that S. B. Holmes, now deceased, during all of said time was the United States postmaster in said city of Frankfort, Kentucky.

This affiant further states that just prior to the 28" day of February, 1900, J. C. W. Beckham, who was claiming to be the governor of the State of Kentucky, and other persons, who were claiming to be the other State officers of said State, claimed the right to receive from the United States post office at Frankfort, Kentucky, mail addressed to the State officials of the State of Kentucky, and that the postmaster at Frankfort, the said S. B. Holmes, now deceased, not being advised as to whom should be delivered such mail, telegraphed to the United States Postmaster General, the Honorable Charles Emory Smith, at the city of Washington, D. C., for instructions as to the delivery of such mail, advising said Postmaster General that the State contest board had given certificates of election to the Democratic contestants, who were demanding all mail addressed to State officials, and advising him further that the Republicans, including William S. Taylor, were holding the offices and claiming the mail; and that on said date the said Postmaster General of the United States telegraphed to said Holmes, postmaster at Frankfort, directing him to deliver to the person named all mail addressed to official persons by name, and that he should deliver mail addressed to State officers, without designation by name to the actual incumbents of the offices. He states that at said time William S. Taylor



was in actual, physical possession of the office and building provided by the State of Kentucky for its governor, and that after the receipt of the telegraphic message from said United States Postmaster General, Charles Emory Smith, all mail addressed to the governor of Kentucky without designation by name and received at the United States post office at Frankfort, Kentucky, was delivered by said postal authorities in the city of Frankfort to said William S. Taylor and the said postal authorities in the city of Frankfort continued to deliver such mail to said William S. Taylor until the said Taylor vacated said office and left the city of Frankfort, to-wit:—on or about the 21<sup>st</sup> day of May, 1900.

This affiant further states that he retains an accurate recollection of the fact that during the several days the controversy existed as to the delivery of said mail, a large quantity of official mail accumulated in the said post office at Frankfort, and that after the receipt of said telegram on the 28<sup>th</sup> day of February, 1900, containing the instructions of the United States Postmaster General as hereinbefore referred to, all of said official mail which had so accumulated and which was addressed to the governor of Kentucky without designation by name, was delivered by said postal authorities in Frankfort to said William S. Taylor at the executive offices in the executive building in said city of Frankfort.

J. W. PRUETT.

Subscribed and sworn to before me by John W. Pruett this 6<sup>th</sup> day of June, 1905.

[SEAL.]

A. G. RONALD,  
Clerk U. S. District Court,  
Western District of Kentucky.

United States Circuit Court for the Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY }  
vs. }  
CALEB POWERS.

CITY, COUNTY, AND STATE OF NEW YORK, ss.:

John W. Griggs, being duly sworn, on his oath deposes  
682 and says:—

That from February 1<sup>st</sup>, 1898, to March 31<sup>st</sup>, 1901, he was the Attorney General of the United States in the Cabinet of President McKinley. That on February 1<sup>st</sup>, 1900, W. S. Taylor governor of Kentucky, made application to President McKinley for recognition as the proper and legal governor of Kentucky and for protection against domestic violence. The application of Governor Taylor was referred, by the President, to me for my advice and direction, and in pursuance of such reference, I made and furnished to

President McKinley on February 3", 1900, a memorandum of my views in writing, a copy of which is hereto annexed marked "Exhibit A". Subsequently, at the request of the President, I prepared the draft of a telegram to be sent by the President to Governor Taylor in response to his application. That telegram was as follows:

"Governor W. S. Taylor, Frankfort, Ky.:

Replying to your telegram of first inst., I call your attention to sec. 5297, Revised Statutes of the United States, which provides as follows: In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive when the legislature cannot be convened, to call forth such number of the militia of any other State or States which may be applied for as he deems necessary to suppress such insurrection; or, on like application, employ for the same purpose such part of the land or naval forces of the United States as he deems necessary. The facts stated in your telegram are not such as under the Constitution and laws authorize Federal interference."

The name "Governor W. S. Taylor" at the head of the draft was written by President McKinley in his own handwriting.

Subsequently, on or about the 28" day of February, 1900, I was consulted by Postmaster General Smith relative to a telegram received from Postmaster Holmes at Frankfort, Kentucky, asking for instructions as to delivery of mail to State officers, there being  
683 conflicting claimants. I advised the Postmaster General to instruct the postmaster at Frankfort to deliver mail addressed to State officers by name to the person named, and mail addressed to State officers without designating name to the person actually filling such office.

JOHN W. GRIGGS.

Sworn to and subscribed before me this 6" day of June, 1905, at the city of New York aforesaid.

[SEAL.]

PHILIP S. HILL,  
Notary Public, New York County.

EXHIBIT "A." J. W. G.

DEPARTMENT OF JUSTICE,  
WASHINGTON, D. C., February 3", 1900.

Memorandum of views of the Attorney General as to application of W. S. Taylor, governor of Kentucky, made to the President February 1", 1900, for recognition as the proper and legal governor of the Commonwealth of Kentucky and for protection against domestic violence.

The application of Governor Taylor recites his election in November, 1899, as governor of Kentucky, the canvass of the votes by

the board of election commissioners of the State, who, in due form of law gave him a certificate of election; and that he was duly inaugurated and installed as governor; that a notice of contest was filed by his competitor, William Goebel, and the legislature, which was the body empowered by law to try contests between parties claiming to be elected to the office of governor, was proceeding to hear the contest, the legislature being in regular session at the seat of government at Frankfort.

684 The application of Governor Taylor sets forth many acts and proceedings of the contestants and of the legislative committees charged with the hearing of the contest, which appear to be flagrant violations of the rights of the incumbent, but all of them are such matters as are within the lawful and judicial power of the legislature, and are not subject to appeal as to their validity in a collateral manner. On January 30<sup>th</sup>, 1900, while the legislature was in session and the contest undecided, Goebel, the contestant, was shot, and since that date has been in imminent danger of death from his wound. On January 30<sup>th</sup>, Governor Taylor, by proclamation, declared the legislature adjourned to meet at the city of London, Kentucky, on February 6<sup>th</sup>. The members of the two houses of the legislature, after said proclamation was read to them, declined to pay any attention whatever to the same, but assembled in some private room or place unknown and proceeded, without any Republican members present, to vote in confirmation of the report declaring Goebel to have been legally elected governor. Afterwards Goebel took the oath of office as governor and issued a proclamation commanding the State Guards, who had been called out by Governor Taylor to preserve the public peace, to disperse. The present situation is described by the governor as follows:—

"The condition of affairs in Kentucky are of a most threatening character, and at any moment bloodshed and riot may ensue and the lives of the citizens be taken. Indeed, there is no telling where this thing may stop, and I seriously doubt my ability to control it, should it arise. I therefore appeal to you as the Chief Executive of

this nation to recognize me as the proper and legal governor  
685 of the Commonwealth of Kentucky, and thereby bring about peace and harmony throughout the State. \* \* \* The legislature is not now in session, and has not been since they were adjourned by my proclamation, and I therefore call on you for protection against domestic violence, as it is not safe for the legislature to assemble here and they refuse to go elsewhere."

The Constitution of the United States, article IV, section 4, declares "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." Congress has prescribed the method in which this provision shall be enforced. Section 5297 of the Revision Statutes is as follows:—

"In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State of States which may be applied for, as he deemed sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary."

It is obvious that the right of the governor to call for assistance from the Federal Government against domestic violence depends on two conditions, first,—that the legislature shall not be in session; and, second,—that it cannot be convened. Neither of these conditions, in my judgment, at present exists.

I think the legislature of Kentucky is in lawful session within the meaning of the Constitution and the statute above quoted. There is no obstacle to its assembling in daily session except the proclamation of the governor proroguing it on January 30", and directing it to meet on February 6" at another place than the seat of government. There appears to be no reason why the legislature should not convene immediately at the seat of government, if the governor so desires. Nothing seems to prevent such meeting except his opposition. At the most, the legislature is not adjourned, but merely in recess.

Even conceding that the legislature is not in strict session, yet undoubtedly it can be convened and will convene not later than next Tuesday. Therefore it appears that the only authority in Kentucky having a right under the Constitution and laws of the United States to call for Federal assistance is the legislature, and the governor has no such power.

Not does it appear that there is any necessity at the present time for such interference as is asked for. There does not appear to be any actual domestic violence in the State, but, according to the statement of Governor Taylor, merely an expectation that, under certain circumstances, domestic violence will occur. It does not appear that the governor has not in his command sufficient forces to suppress such violence if it arises. The State guard, which is the local militia, appears to be under the command and control of Governor Taylor, and it does not appear that there is any other organized force in the State which is making or threatens to make trouble or to raise insurrection.

On an application of this kind, the President is not required to confine himself to the facts stated in the application of the governor, but may investigate the circumstances and ascertain by other means the truth concerning the situation. It appears to be well established, as matter of uncontradicted general news, that the title of William Goebel to be governor of Kentucky is being submitted to the determination of the civil tribunals of the State, in conformity with the constitution and laws of Kentucky. There appears to be no reason why such a course should not be submitted to

by both contestants and the authority of the civil tribunals be allowed to deal with the matter and dispose of it without any clash of arms or violent conflict of authority. At any rate, until such conflict actually occurs and it is apparent that the lawful authorities of the State cannot suppress it by their own means and an application for Federal assistance has been made in accordance with the Constitution and laws of the United States, there is no just ground on which the President can interfere.

On the same day, to-wit:—June 8", 1905, an order was made and entered herein, same being in words and figures as follows, to-wit:

May Term, Thursday, June 8", A. D. 1905.

COMMONWEALTH OF KENTUCKY }  
   vs. }  
   CALEB POWERS. }

This day this cause coming on to be heard upon the motion of defendant for a writ of *habeas corpus cum causa*, the plaintiff objecting thereto, came counsel for the respective parties and made argument to the court upon said motion. It being impossible to conclude the argument at the present session of the court, it is now ordered that its further hearing be and same is continued until Friday, June 9", 1905, at 9 a. m.

688      On a day following, to-wit:—June 9", 1905, an order was made and entered herein, same being in words and figures as follows, to-wit:—

May Term, Friday, June 9", A. D. 1905.

COMMONWEALTH OF KENTUCKY }  
   vs. }  
   CALEB POWERS. }

This day again came the parties plaintiff and defendant by their respective attorneys, and the further hearing of the argument upon the pending motion being concluded. The court not being duly advised takes time, said motion is submitted and both sides are given leave to file "memo." of authorities or briefs.

On a day following, to-wit:—June 12", 1905, the affidavit of George B. Cortelyou, was "tendered" herein, said affidavit being in words and figures following, to wit:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiff, }  
 vs. } Affidavit.  
 CALEB POWERS, Defendant.

The affiant, George B. Cortelyou, states that, through the year 1900, he was secretary to William McKinley, as President of the United States; that the following papers, referred to in the affidavit of the Hon. John W. Griggs, late Attorney General of the United States, have been in affiant's custody since the death of President McKinley, to-wit:—

1. A typewritten memorandum of Attorney General Griggs, 689 giving his views of the law bearing upon the application of Governor W. S. Taylor, of Kentucky, for Federal interference in said State.

2. The original of the telegram in response to said application.

Affiant further states that he is familiar with the handwriting of President McKinley, and with that of Attorney General Griggs, and that the body of said telegram was written, in pencil, by Attorney General Griggs, and that it was addressed, in ink, by President McKinley to "Governor W. S. Taylor, Frankfort, Kentucky."

GEO. B. CORTELYOU.

Subscribed and sworn to before me by George B. Cortelyou this 9<sup>th</sup> day of June, 1905.

THOS. E. ROACH,  
 [SEAL.] Notary Public in and for the District of Columbia.

On a day following, to-wit:—July 7<sup>th</sup>, 1905, an order was made and entered herein, said order being in words and figures, as follows, to-wit:—

May Term, Friday, July 7<sup>th</sup>, A. D. 1905.

COMMONWEALTH OF KENTUCKY }  
 vs. }  
 CALEB POWERS.

This cause came on to be heard on the motion of the defendant, Caleb Powers, for a writ of *habeas corpus cum causa* and was argued by counsel for Powers and by counsel for the Commonwealth and was submitted to the court, on consideration whereof, said 690 motion is granted for the reasons set forth in the written opinion which is filed herein and made a part of the record; and it is ordered that the clerk issue a writ of *habeas corpus cum*





"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatever, against any person who is denied or cannot enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution is pending any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States \* \* \* such suit or prosecution may, upon the petition of such defendant filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease and shall not be resumed except as hereinafter provided."

The remaining portion of the section provides for filing the transcript of the record in the State court in the circuit court of the United States and for docketing the cause therein. Before stating the proceedings which have been had under said section and  
693 considering their effect upon the jurisdiction of said prosecution, it will be well to do two things. One is to realize the constitutionality of said section and to come to an understanding as to the basis of its constitutionality. This understanding will aid in its construction when we come to take that matter up. Its constitutionality was directly upheld in the case of *Strauder v. West Virginia*, 100 U. S., 303, and assumed in the case of *Virginia v. Rives*, 100 U. S., 313, decided the same day, and in the cases of

*Neale v. Delaware*, 103 U. S., 370;  
*Bush v. Kentucky*, 107 U. S., 110;  
*Gibson v. Mississippi*, 162 U. S., 565;  
*Smith v. Mississippi*, 162 U. S., 592;  
*Murray v. Louisiana*, 163 U. S., 101;  
*Williams v. Mississippi*, 170 U. S., 213,

decided subsequently. Its peculiarity, causing one to want to understand as to its constitutionality, if not to question it, consists in the fact that it provides for the removal of a State prosecution for a State offense pending in a State court to a Federal court. Section 643, heretofore referred to is like it in this particular. It, too, provides for the removal of a State prosecution for a State offense pending in a State court to the Federal court, but in a different state of case from that provided in section 641. That state of case is when the prosecution is against "any officer appointed under or acting by authority of any revenue law of the United States — or against any person acting under or by the authority of any such officer or on account of any act done under color of his office or of any  
694 such law or on account of any right, title or authority claimed by such officer or other person under any such law," &c. This statute originated about the same time as that contained in section 641 in section 67 of the act of July 13", 1866, and was carried from thence into the revision of 1873-74 as section 643.

On the same day that section 641 was held to be constitutional, to-wit, in the case of *Strauder v. West Virginia*, *supra*, section 643 was held to be constitutional, also, in the case of *Tennessee v. Davis*, 100 U. S., 257.

That day was March 1<sup>st</sup>, 1880. It may be said to have been a great day in the history of Federal jurisprudence. On the same day, section 4 of the act of March 1<sup>st</sup>, 1875, making it an offense against the United States, punishable in its courts, for a State officer or other person charged with any duty in the selection or summoning of jurors in State courts to exclude or fail to summon any citizen possessing all other qualifications prescribed by law on account of race, color or previous condition of servitude, was held to be constitutional in the case of *Ex parte Virginia*, 100 U. S., 339.

At the same time section 641 was construed not only in *Strauder v. West Virginia*, *supra*, but also in *Virginia v. Rives*, *supra*.

A vigorous attack was made in said four cases thus disposed of on the same day upon the constitutionality of said sections 641 & 643 and section 4 of the act of March 1<sup>st</sup>, 1875, by Justices Field and Clifford, and they dissented from the conclusion of the majority of the court as to the constitutionality of each statute. Justice

695 Clifford wrote the dissenting opinion in *Tennessee v. Davis* and Justice Field that in *Ex parte Virginia*. Their views as to the constitutionality of section 641 were embodied in a separate opinion by Justice Field in *Virginia v. Rives*, in which concurrence was expressed with the opinion of the majority of the court in that case as to the construction of section 641 and its applicability to a case of that kind. The ground of their attack upon all three statutes was in substance that they were an invasion of the sphere of State action, there being nothing in the Federal Constitution to warrant them. In the case of *Ex parte Virginia*, Justice Field, in referring to the criminal prosecution of a State officer in a Federal court under section 4 of the act of March 1<sup>st</sup>, 1875, said;

"The proceeding is a gross offense to the State; it is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a local municipal corporation."

In the case of *Tennessee v. Davis*, Justice Clifford said;

"Viewed in any light, the proposition to remove a State indictment for felony from a State court having jurisdiction of the case into the circuit court where it is substantially admitted that the prisoner cannot be tried until Congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous that I fear I shall never be able to comprehend the practical wisdom which it, doubtless contains."

Both judges had much to say as to the mode of procedure in the Federal courts after the removal thereto of a criminal prosecution pending in the State court under either section 641 or 643. Justice Field, in *Virginia v. Rives*, said;

696 "There are many other difficulties in maintaining the position of the circuit court which the counsel of the accused and the attorney general have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal court, what officer is to prosecute the case? Is the attorney of the Commonwealth to follow the case from his county or will the United States district attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it—the governor of the State or the President of the United States? Can the President pardon for an offense against the State? Can the governor release from the judgment of a Federal court? These and other questions which might be asked show, as justly observed by the counsel of Virginia, the incongruity and obscurity of the attempted proceeding."

The necessity of Congress having to enact some mode of procedure in such a case after its removal before the prosecution could be tried seems not to have been admitted as Justice Clifford thought. Concerning this matter, Justice Strong who delivered the opinion on behalf of the court in all four cases, in the case of *Tennessee v. Davis*, said;

"The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal.

697 While it is true there is neither in section 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered, the cause when removed shall proceed as a cause originally commenced in that court. Yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the General Government grows entirely out of the division of powers between that Government and the government of a State; that is, divisions of sovereignty over certain matters. When this is understood, and it is time it should be, it will not appear strange that even in cases of criminal prosecution for alleged offenses against a State, in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts according to its own forms of proceeding."

The warrant found by the majority of the court in the Federal Constitution for section 643 was the second section of article 3 and the 8<sup>th</sup> section of article 1 thereof. By the former it is provided that the judicial power of the Federal Government shall extend to all cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority. By the latter it is provided that Congress shall have power to make all

698 laws necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States or in any department or officer thereof. It was

held that a State prosecution for a State offense pending in a State court in which the defendant claims that the act for which he is being prosecuted was done under the color of his office as a Federal official was a case arising under the Constitution and laws of the United States to which the judicial power thereof extended and that a law providing for the removal of such prosecution to the Federal court was proper for carrying into execution such power.

The warrant so found for sections 641 and 642 and section 4 of the act of March 1<sup>st</sup>, 1875, was the fourteenth amendment to the Federal Constitution and particularly that part thereof contained in the last clause of the first section thereof, providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws" and in the fifth section thereof, providing that

"The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Said last clause of the first section though in form a prohibition simply against State action amounting to a denial to any person within its jurisdiction of the equal protection of its laws conferred a right on such a person to the equal protection of the laws which he was entitled to enforce. In the case of *Yick Wo v. Hopkins*, 118 U. S., 356, Justice Matthews said that it was "a pledge of the equal protection of the laws." In the case of *Stauder v. West Virginia*, *supra*, Justice Strong said:

"The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right."

699 And in the civil rights cases, 109 U. S., 3, Justice Bradley said:

"Positive rights and privileges are undoubtedly secured by the 14<sup>th</sup> amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect."

As to the protection afforded by said clause of the amendment, Justice Field had this to say in the case of *Santa Clara v. So. Pac. R. Co.*, 18 Fed., 398.

"This protection attends every one everywhere, whatever be his position in society or his association with others either for profit, improvement or pleasure. It does not leave him because of any

social or official position which he may hold or because he may belong to a political body or to a religious society or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed Government holds at all times over every man, woman, and child in all the broad domain wherever they may go and in whatever relation they may be placed."

Said sections 641 and 642 enforce said last clause of the first section in that they provide that if in a civil or criminal prosecution pending in a State court the defendant therein is denied or cannot enforce therein any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction thereof by which is meant said clause or any statute so providing passed pursuant thereto, he shall be entitled to have the suit or prosecution removed to the Federal court.

Said section 4 of the act of March 1<sup>st</sup>, 1875, enforces said 700 clause in that it provides for the indictment and conviction in a Federal court of any State official charged with the duty of selecting or summoning jurors who discriminates against him because of his color and to this extent denies him the right to the equal protection of the laws pledged by said clause.

So much, then, as to the constitutionality of section 641 and to the basis thereof.

The other thing which it will be well to do before stating the proceedings had under said section and considering their effect upon the jurisdiction of the prosecution is to give an outline of the proceedings had in the State courts before and up to the beginning of said removal proceedings and thus fit the two together. March 9<sup>th</sup>, 1900, said prosecution was begun by the issuance of a warrant for defendant's arrest by the county judge of Franklin county. March 11<sup>th</sup>, 1900, defendant was arrested under said warrant. March 27<sup>th</sup>, 1900, after an examining trial had before said county judge, he was held without bail to the grand jury of said county at the then next April term of the circuit court thereof. April 17<sup>th</sup>, 1900, an indictment found by said grand jury was returned into court. May 2<sup>nd</sup>, 1900, the prosecution was transferred to the circuit court of Scott county, an adjoining county to Franklin and in the same judicial district and within said eastern district of Kentucky, on defendant's motion for a change of venue. Beginning July 9<sup>th</sup>, a special term of the said Scott circuit court was held at which defendant was tried and found guilty by the jury who fixed his punishment at imprisonment for life. The verdict was returned August 18<sup>th</sup>, 1900 and judgment therein was entered September 5<sup>th</sup>, 1900. The jurors from whom said jury was impanelled came from Scott county and said jury was composed entirely of Scott County jurors.

701 March 28<sup>th</sup>, 1901, the court of appeals of Kentucky reversed this judgment, the court standing four to three in favor of the reversal, and remanded the prosecution to the lower court for further proceedings consistent with the opinion then delivered. The grounds



of reversal were errors of the lower court as to the admissibility of testimony and instructions to the jury. October 10", 1901, at the regular October term 1901, of said court, a second trial of defendant was had which terminated as the first trial. The verdict of the jury was returned October 26", 1901, and judgment therein was entered the same day. The jurors from whom this jury was impaneled came partially from Scott county and partially from Bourbon county, an adjoining county to Scott and in the same State judicial district, and said jury seems to have been composed of six jurors from Scott and six from Bourbon. December 3", 1902, the court of appeals reversed this judgment, the court standing four to three in favor of reversal, and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the same as on the first appeal and in addition, the refusal of the judge of the lower court to vacate the bench at the second trial therein upon defendant's filing an affidavit under section 968 of the Kentucky Statutes to the effect that said judge would not give him a fair and impartial trial and setting forth at large the facts upon which he based this claim. On the filing of the mandate of the court of appeals in the lower court, said judge refused to vacate the bench and thereafter was required to do so by a writ of prohibition from the appellate court. Thereupon a special judge was appointed by the governor to try the case at the next trial. Beginning August 3", 1903, a special term of the Scott 702 circuit court was held at which defendant was again tried and found guilty, but this time the jury fixed his punishment at death instead of imprisonment for life as had been done by the two former juries. The verdict was returned August 29", 1903, and judgment thereon was entered the same day. The jurors from whom this jury was impanelled came from Bourbon county and said jury was composed entirely of Bourbon County jurors. December 6", 1904, the court of appeals reversed this judgment, the court standing four to three in favor of reversal, and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the entering of the judgment upon the verdict of the jury the same day it was returned in violation of a code provision when defendant was seeking more time for filing additional grounds for new trial and improper conduct on the part of one of the employed counsel for the Commonwealth in his argument to the jury. Theretofore a jury in the Franklin circuit court had convicted James B. Howard, claimed to be the assassin of William Goebel, of his murder, and fixed his punishment at imprisonment for life. Said counsel in his argument to the jury made this statement in regard to that verdict, to-wit:

"Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him and one was for life imprisonment and the eleven had to come to the one," which the lower court permitted to be made against defendant's objection. The opinion

delivered in the court of appeals on the three separate hearings therein may be found reported as follows, to-wit;

Powers vs. Com. 110 Ky. 386.

Same v. Same, 114 Ky. 237.

Same v. Same, 83 S. W. 146.

703 The term of office of one of the judges of the court of appeals who concurred in the said judgments of reversal expired on the first day of January last and he was succeeded by the judge of the Scott circuit court who presided at the first two trials; having been elected to said position at the regular November election in 1904. Upon his vacating the office of circuit judge, an appointment was made by the governor to fill the vacancy until the November election in this year. May 3", 1905, the third day of the May term 1905 of said Scott circuit court, the mandate of the court of appeals, issued upon its last judgment of reversal, was filed in the Scott circuit court and the prosecution was set for a fourth trial at a special term to begin the 10" of this month, three days hence, when a trial will be had in said court before the judge appointed to fill said vacancy, if the jurisdiction of the prosecution remains in the State court.

It is now in order to state the proceedings had under section 641, and after doing so to consider the question whether their effect has been to work a transfer of jurisdiction. Those proceedings were begun in the Scott circuit court May 3", 1905, immediately upon the filing of the mandate of the court of appeals as hereinbefore stated. At that time defendant tendered to said court a petition for the removal of the prosecution from that court to this court and moved that he be permitted to file the same. Upon the objection of the Commonwealth, said court refused to permit said petition to be filed. The next circuit court of the United States in this district held thereafter was the London term which began May 8", 1905, five days after the tendering of the petition for removal to the State court. On that day, upon defendant's motion, a partial transcript of the record in the State court—all that the clerk thereof 704 was able to furnish in the meantime—was filed and the cause was docketed in said court. The Commonwealth objected to this action of the court and upon its being had moved to set it aside, which motion was overruled. Leave was then granted to the defendant until the 8" day of June thereafter to procure and file an additional transcript, which has been done within the time limited. The motion for the writ of *habeas corpus* was made at the time of filing the partial transcript and docketing the cause, and, after the filing thereof, to-wit, on June 8", said motion was taken up, argued and submitted.

We are now in position to confront the question raised by said motion for a writ of *habeas corpus*, to-wit; whether the effect of said removal proceedings has been to work a transfer of jurisdiction. Three things are essential in order that they should have had that

effect. The first thing is that it must appear that the defendant has a right which he is entitled to enforce. The second is that it must appear that such right is a right secured to him by a law providing for the equal rights of citizens of the United States or of all persons within the jurisdiction of the United States *i. e.*, a right secured to him by the equal protection of the laws clause of the 14" amendment, or a statute passed pursuant thereto and the 5" section thereof. It is not sufficient that it be a right he is entitled to enforce. It must be a right so secured to him. The third, and last, thing is that it must appear that the defendant is denied such right or cannot enforce it in the State courts having jurisdiction of the prosecution against him within the meaning of section 641.

The petition for removal contains two paragraphs, in each of which defendant states a separate right which he claims he is  
705 entitled to enforce, is secured to him by said clause of the 14" amendment and is denied him and cannot be enforced by him in the State courts in the prosecution therein against him. That stated in the first paragraph is the right to be released from further custody under the charge against him, because of a pardon for said offense issued to him March 10", 1900, the day after his arrest, by William S. Taylor, then claiming to be governor of Kentucky. That stated in the second paragraph is a right to have the jurors from which the jury is to be impanelled that is to try him selected from persons possessing the statutory qualifications, without discriminating against those of them who belong to the same political class to which he belongs, to-wit, Republicans, because of their belonging to such class.

I prefer to take up the right stated in the second paragraph first and consider and determine whether defendant has any such right—whether, if he has, if it is secured to him by said clause of the 14" amendment—and whether, if it is, it is denied him or cannot be enforced by him in the State courts in the prosecution against him. The first two questions go together; for it is not claimed that he has any such right other than by virtue of said clause of the 14" amendment. It is to be noted that if he has any such right it is only in relation to State action. It is not in relation to individual action apart from State connection. Of course it could not well be otherwise; for no one has anything to do with the selection of jurors but some person acting for and on behalf of the State. If it exists, however, it is a right in relation to State action through any of its agencies. Justice Field in *Ho Ah Kow v. Nuran* Fed. Cas. No. 6546, said:

706 "This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities."

The right secured by said clause, when its language is departed from, is almost invariably if not entirely referred to as a right to

have the State refrain from unjust or unreasonable discrimination. A State has a right to discriminate between persons within its jurisdiction, but such discrimination must be along just and reasonable lines. A discrimination that is without a just or reasonable basis is purely arbitrary, and as said by Justice Matthews in *Yick Wo v. Hopkins*, *supra*, the principles upon which the institutions of our Government are supposed to rest "leave no room for the play and action of purely personal and arbitrary power." He said further therein as follows, to-wit:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights the denial of equal justice is still within the prohibition of the Constitution."

As a rule, at least, discrimination by a State between classes of persons within its jurisdiction is unjust and unreasonable. Justice Matthew in the case last mentioned, in referring to the ordinance involved therein which left the question as to who might carry on the laundry business in San Francisco in wooden buildings  
707 to the arbitrary consent of a board of supervisors, who in administering it refused consent to Chinese, said;

"The fact of this discrimination is admitted. No reason for it is shown and the conclusion cannot be resisted that no reason for it exists except hostility, to the race and nationality to which the petitioners belong and which in the eye of the law is not justified. The discrimination is, therefore, illegal and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the fourteenth amendment of the Constitution." In the case of *Holden v. Hardy*, 169 U. S. 366, in referring to a discrimination by a State through legislative action, Justice Brown said:

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

In the case of *Ho Ah Kow v. Nuyan*, *supra*, Justice Field in referring to similar discrimination said;

"But in our country hostile and discriminating legislation by a State against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment."

And in the case of *Gibson v. Mississippi*, *supra*, Justice Harlan said;

"In the administration of criminal justice, no rule can be applied to one class which is not applicable to all other classes."

In the matter of selecting jurors, it is well settled that  
708 that there may be a discrimination by the State between persons within its jurisdiction that is just and reasonable and hence right under the 14<sup>th</sup> amendment. Justice Strong alluded to

such discrimination in *Strauder v. West Virginia*, *supra*, when he said ;

" We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14<sup>th</sup> amendment was ever intended to prohibit this. Looking at its history it had no such purpose."

Beyond such discrimination, a class discrimination in the selection of jurors is unjust and unreasonable. In the cases heretofore cited, beginning with *Strauder v. West Virginia*, in which the constitutionality of section 641 was held or assumed, it was held or assumed that a discrimination in the selection of jurors against negroes because of their color was unjust and unreasonable and hence in violation of the 14<sup>th</sup> amendment. No occasion has arisen heretofore to decide whether any other class discrimination in the selection of jurors was likewise unjust and unreasonable and such a violation. But in the case of *Strauder v. West Virginia*, *supra*, Justice Strong said ;

" If in those States where the colored people constitute a majority of the entire population, a law should be enacted excluding all white men from jury service, thus denying to them the privileges of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Now if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment."

Judge Barker in his separate opinion rendered on the last hearing of this prosecution in the court of appeals (83 S. W. 149) sums up the position of the Supreme Court of the United States in this particular in these words ;

" The Supreme Court of the United States, the final arbiter in all matters involving the Federal Constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens under the thirteenth, fourteenth and fifteenth amendments. But the application of the principle under discussion is not confined to the rights of negroes. It extends to every person—whatever his race, color or political affiliation—if his legal rights have been denied solely because thereof."

There would seem, therefore, to be no room to question that the defendant has the right which he asserts in the second paragraph of

his petition, to-wit; to have the jurors from which the jury is to be impanelled that is to try him—selected from persons possessing the statutory qualifications without discrimination against those of them who are members of the same political class as defendant because of their belonging to such class and that it is a right secured to him by the equal protection of the laws clause of the 14<sup>th</sup> amendment. The right which he thus has is a right against discrimination on that account. It is not a right to a mixed jury *i. e.*, to have on the jury members of the political class to which he belongs. On this point Justice Strong had this to say in *Virginia v. Rives, supra*;

“Nor did the refusal of the court and the counsel for the prosecution to allow a modification of the venire, by which one third of the jury or a portion of it should be composed of persons of the petitioner's own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved and which they also asked from the prosecution, was not a right given or secured to them or to any person by the law of the State or by any act of Congress, or by the 14<sup>th</sup> amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz; a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia or by any Federal statute. It is not, therefore, guaranteed by the 14<sup>th</sup> amendment or within the purview of section 641.”

The right against discrimination, therefore, is a constitutional right and should be respected by every one who in an official way has to deal with it. It should not be disregarded for any reason—not even because of a sincere conviction of guilt on the part of the accused and a fear that otherwise he will go unwhipped of justice. The conception of a jury selected without class discrimination is a narrower conception than that of a fair and impartial jury. It is, however, an essential element in the conception of a fair and impartial jury. There cannot be a fair and impartial jury where there has been class discrimination. Just how far the fairness and impartiality of the jury will be affected by such discrimination depends on circumstances. In some circumstances it will be affected more than in others. But it is hard to conceive of a case where it will be more affected than in a case where there has been discrimination against the political class to which the defendant belongs and the case has a political bearing and has awakened great political feeling. Judge Barker in the dissenting opinion heretofore referred to truly said:

“I do not insist that in ordinary criminal trials there is any ne-



cessity for watchfulness to keep politics out of the jury box. When, ordinarily, one is arraigned for crime, it is immaterial whether the jurors are of the same or an opposing political party. Usually this is a question which excites neither the interest of the accused nor that of his counsel. But when the offense springs from an intense political contest, all becomes different. Then the political complexion of the jury is all-important. The administration of even-handed justice has no more insidious enemy than political prejudice. It enters unseen and unsuspected into the human mind, corrodes the reason and undermines the judgment. Neither purity of heart nor exaltation of character afford an antidote for this deadly poison. Indeed these virtues may well magnify the evil, for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity."

And again :

"Nothing so surely tends to enhance the respect men owe to the law than a fairly rooted conviction that its judgments are the offspring of evenhanded justice and of its temple, an impartial jury, is the chief corner stone. On the other hand, nothing is so certainly productive of distrust and fear out of which springs anarchy as a well grounded suspicion that judicial procedure is tainted with partiality and indirection. That conviction forms the basis for the love of the citizen of his State in return for 'the equal protection of the laws' and this suspicion engenders the scorn and hatred which all good men entertain for that oriental system of judicature with whose decrees the chance of the dice box is honest by comparison; and of this suspicion a partizan jury is the most effective promoter."

This court, in order to secure a selection of jurors without discrimination on account of politics, has provided by rule that they shall be selected by two persons, one of whom shall be the clerk of the court and the other a person of opposite politics to the clerk, and such, no doubt, is the rule in all the Federal courts.

It remains so far as this branch of the case is concerned to consider and determine whether within the meaning of section 641 it appears that the defendant is denied or cannot enforce in the State courts this constitutional right thus determined to be his. It will be noted that he is entitled to a removal if either he is denied or cannot enforce such right therein. Justice Bradley in the case of

*Texas v. Gaines*, Fed. Cas. No. 13,847,

in referring to the third section of the original Civil Rights act of April 9", 1866, substantially the same as section 641 in wording, said :

"What says the third section? How does it describe and define those who are within the meaning of the act? It defines them as 'persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act.' Here are

two classes: (1.) Persons who are denied any of the rights secured to them by the first section of the act. (2.) Persons who cannot enforce in the courts any of said rights."

And first, does it appear that the defendant is so denied the rights in question? Here too, the question breaks in two. What facts appear in relation to a denial thereof? And what is the proper legal construction to be placed upon such facts?

It will aid in presenting them, to make a preliminary statement in regard to two matters. One relates to the method of selecting jurors prescribed by the statutes of Kentucky. A certain number of jurors are selected annually by three jury commissioners appointed annually for each county by the judge of the circuit court. In Scott county the jury commissioners seem to be appointed each year at the regular October term of the circuit court thereof. The names of the jurors thus selected are placed by the commissioners in a wheel and the regular panels of grand and petit jurors for each term thereafter during the year are drawn from the wheel. The commissioners draw the panels for the first term thereafter and the circuit judge draws them for the subsequent terms. The statute prescribes that the commissioners shall be intelligent and discreet

housekeepers of the county, over twenty one years of age, 714 resident in different portions of county and having no action in court requiring the intervention of a jury. They are required to select the jurors from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, over twenty one years of age. It is provided that the judge of the circuit court may at any time during the term when it is necessary after the regular panel is for any reason exhausted draw and select from the wheel other persons to act as grand and petit jurors or he may in his discretion direct that such jurors be supplied from bystanders.

The other matter referred to is the number of peremptory challenges allowed in the State courts in a felony prosecution. They are five to the Commonwealth and fifteen to the defendant.

Now as to the facts that appear in relation to a denial of defendant's said constitutional right. And first what facts are alleged in the second paragraph of the petition?

Four circumstances are alleged that have a tendency to induce a suspicion, if not an actual belief, that in the selection of the jurors from which the jury that tried defendant on each occasion came those persons qualified for jury service who belonged to the same political class as defendant, to-wit, Republicans, were purposely excluded therefrom and thus discriminated against. The first is the existence of a state of feeling against the defendant on the part of those of opposite politics because of his alleged offense. It is alleged that at the regular election for governor and other State officials, in November 1899, said William Goebel was the Democratic candidate for governor, said William S. Taylor was the Republican candidate therefor and defendant was the Re-

publican candidate for the office of secretary of state—that said Taylor, defendant and the other Republican candidates were declared elected and inducted into their respective offices—that thereafter Goebel contested Taylor's right to the office of governor, defendant's opponent contested his right to the office of secretary of state and like contests were had as to the other offices—that it was pending said contest, that Goebel was assassinated—that the public mind was greatly inflamed and bitter and intense political animosities were excited and fostered by reason of said election, contest and assassination—and that such feelings existed at each of said three trials and still existed against him on the part of Goebel Democrats throughout the State and particularly in Scott county. At the election in 1899 there was a split amongst the Democrats. John Young Brown ran as an Independent and by Goebel Democrats is meant those that supported Goebel. The second is that those who had to do with selecting the jurors from whom the three juries came were all Goebel Democrats. The third is that at the time of each of the trials there were in Scott and Bourbon counties such a number of Republicans qualified for jury service that it is not likely that a jury would have been obtained having no Republicans upon it. It is alleged that at the presidential election in November 1900, 2500 Democratic and 2100 Republican votes were cast in Scott county—that in the presidential election in 1896, 2600 McKinley and 2200 Bryan votes were cast in Bourbon county—and that at the State election in 1899, Taylor received 27 more votes than Goebel in Bourbon county. It appears from the returns that at the last three presidential elections in said two counties the vote was as follows:

## Scott County.

	Dem. votes.	Rep. votes.
1896.....	2374	1713
1900.....	2539	2107
1904.....	2237	2111

716 The average Democratic vote for the three elections was 2378 and the average Republican vote for same was 1977. For the last two years the former average was 2388 and the latter 2109.

## Bourbon County.

	Dem. votes.	Rep. votes.
1896.....	2210	2578
1900.....	2411	2217
1904.....	2586	2147

The average Democratic vote for the three elections was 2402 and the average Republican vote for same was 2314. For the last two years the former average was 2498 and the latter 2183. It is further alleged that the number of white Republican voters in Scott county is about 1300 and that in Bourbon county  $\frac{2}{3}$  of the Republi-

can vote—are negroes, which would make the white Republican voters in Bourbon county about 900. The proportion of Democratic voters to Republican white voters in Scott county is not as great as two to one. In Bourbon county it is somewhat less than two to one and not as great as three to one. If then no more in proportion of Democratic voters were disqualified or excusable from jury service than Republican white voters—which it is reasonable to conclude is the case—it follows that the proportion of Democratic qualified and non excusable jurors to Republican white qualified and non excusable jurors in Scott county was not as great as two to one and in Bourbon county it was between three to one and two to one. The fourth, and last, circumstance referred to is that upon neither one of the three juries that tried defendant was there a single Republican. As to the composition of the first jury it is alleged that it was composed  
 717 “almost if not entirely of Goebel Democrats and no Republicans,” as to the second jury that it was composed “entirely of Goebel Democrats;” and as to the third that it was composed “entirely of Goebel Democrats—one juror a Goebel supporter, but of doubtful politics, excepted.”

Then certain acts are alleged in relation to the selection of the jurors from which said juries were impanelled and to the impaneling of the juries therefrom, which taken in connection with said circumstances establish, if true, that in such selection Republicans were discriminated against and purposely excluded therefrom in order that there might not be any of them on the jury to try defendant, and that the Scott circuit court held that such discrimination was not illegal and the defendant had no right to have it refrained from. It is alleged as to the first trial at the July-August 1900 special term that there were in the wheel the names of 100 undrawn jurors placed there prior to the election of 1899 and the assassination of Goebel by impartial and unbiased jury commissioners appointed by the circuit judge of October 1899—that upon the regular panel being exhausted defendant moved said judge to select additional jurors required from the wheel and that he refused to do so and directed the sheriff of Scott county to summon first 100 men and then 40 men for jury service from said county and to summon no man from Georgetown, the county seat of said county, but to go out in the county for that purpose—that the men so summoned were with the exception of three or four Republicans and Independent Democrats known to be partizan Goebel Democrats and were with said exception purposely summoned because of their known party affiliation—that when the men so summoned appeared in court they were seated on the side of the court room separate and apart from the spectators and other persons and said judge without notice to defendant or his  
 718 counsel or making any request of either to accompany him left the bench, went to the place where said veniremen were seated, called them up to him one at a time, not in defendant's or in his counsel's hearing, and without swearing them excused such of them as he saw fit from jury service—and that from the

jurors so summoned the first jury was obtained. As to the second trial at the regular October term 1900, it is alleged that at the October term, 1900, when an appeal was pending from the judgment entered upon the verdict of the first jury and there was a possibility of its being reversed and another trial had, said judge appointed as jury commissioners John Bradford, Ben Mallory and H. H. Haggard, all Goebel Democrats—that said jury commissioners placed in the wheel the names of 200 citizens of Scott county, 195 of whom were Goebel Democrats and five of whom were Republicans—that of the names so placed in the wheel, 75 were drawn at the regular February and May 1900 terms of said court and 125 were drawn at the regular October 1901 term upon defendant's second trial—that of the 5 Republicans so placed in the wheel at the beginning, one was drawn at the February term, one at the May term and the other three at the October term—that of the three drawn at the October term, two were disqualified by previously formed opinions and the other was peremptorily challenged by the Commonwealth—that a jury was not obtained from said Scott County jurors, probably as much as six jurors being obtained therefrom, and the sheriff was directed to summon veniremen from Bourbon county—that he summoned 168 veniremen from said county, all of whom were Goebel Democrats except three who were Republicans—and that from the jurors so summoned the remaining jurors of the second jury were obtained. As to the third jury at the last trial at the special term in August 1903, it is alleged that 176 jurors were summoned from

719 Bourbon county and of them three or possibly four were Republicans and the remaining 172 or 173 were Goebel Democrats and were summoned because they differed politically from defendant. It is further alleged that on each of said trials Republicans and Independent Democrats qualified for jury service were intentionally passed by in selecting and summoning veniremen in order that defendant might not have a fair trial by a jury of his peers impartially selected, but to the end that a jury might be selected to convict him—that in the second trial he objected to the formation of a jury from the veniremen summoned and moved the court to discharge the entire venire on the ground that he could not obtain a fair trial before a jury selected therefrom and filed an affidavit in support thereof, but although the statements in said affidavit were true and known to be true by the court he was forced to submit to trial before a jury composed, as heretofore stated—that on the third and last trial, he asked the court to admonish the sheriff to summon an equal number of men of each political party, which request was refused—that he then asked the court to instruct him to summon the talesmen as he came to them regardless of political affiliation, which request was also refused—and that at each of said trials the facts in relation to the jurors as heretofore stated were embraced in affidavits filed in support of challenges to the panel and the venire and objections to the formation of the jury from the men so summoned and also in the motions and grounds for new trial, prepared

and filed on behalf of defendant at each of the trials, but they were disregarded by the court and defendant's challenges to the panels and to the venire and motions for new trial and in each instance were overruled.

The Commonwealth of Kentucky has not filed a reply to said petition for removal or in any way taken issue with the defendant as to any of the allegations thereof. Said allegations must, therefore, be accepted as true save in so far as they may be contradicted by the transcript on file herein.

In the case of *Dishon v. C. N. O. & T. P. Ry. Co.*, 133 Fed. 471, Judge Richards in discussing the affirmative allegations of a petition for removal in a civil suit under the jurisdictional acts of 1887-1888, said;

"If these averments were not true, the plaintiff should have denied them and an issue would then have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

In the case of *Whitten v. Tomlinson*, 160 U. S. 231 Justice Gray, in referring to a petition for a writ of *habeas corpus* under sections 751-755 U. S. Rev. Stat., said;

"In a petition for a writ of *habeas corpus*, verified by oath of the petitioner, as required by U. S. Rev. Stat., sec. 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous."

The allegations of the petition for removal are not borne out by the transcript in all their detail. They are, however, borne out to a substantial degree and are not contradicted in any substantial particular. It establishes the discrimination complained of in the selection of the jurors by the subordinate officers having to do therewith on the second and third trial, and that on both trials the Scott circuit court held that such discrimination was not illegal and the defendant had no right to complain thereof, it not being claimed that the jurors selected did not possess the statutory qualifications. As to the first trial all that the transcript shows is that it was one of the grounds of defendant's motion for new trial that the circuit judge, after the regular panel was exhausted, had refused to draw from the wheel the names of jurors placed there in the fall of 1899 before any motive for discrimination had arisen, concerning which Judge Durrelle had this to say in the opinion delivered by him on behalf of the majority of the court of appeals on the first appeal;

"In the grounds relied on in the motion for new trial it is stated that the court overruled the motion of appellant, after the regular panel was exhausted to draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that in a



case concerning which so much feeling existed, the simple and easy mode was not adopted, which would have put beyond cavil the question of the accused having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial."

There seems to have been no challenge to the venires or the panel on this trial on account of any discrimination. As to the second trial, the transcript shows that the defendant challenged the Scott County jurors drawn from the wheel and each of two Bourbon County venires before the panel was completed and the panel after it was completed because of the discrimination complained of—and that the challenges were overruled. It further shows that defendant filed in support of said challenges the affidavits of himself and three citi-

zens of Scott county and one citizen of Bourbon county, and  
722 that the Commonwealth filed the affidavits of one citizen of

Scott county, one of its employed counsel, of the deputy sheriffs of Scott and Bourbon counties who summoned and assisted in summoning the Bourbon County jurors, and of two citizens of Bourbon county against the challenges. The state of political feeling and the political complexion of the voters of Scott and Bourbon counties, of the qualified jurors therein, of the three jury commissioners appointed in October 1900 pending the first appeal when there was the possibility of another trial, of the Scott County jurors placed in the wheel by said commissioners and those remaining therein at the second trial and of the Bourbon County jurors summoned at said trial was made out by said affidavits the same as stated in the second paragraph of the petition as heretofore cited. Said affidavits specified the names of the five out of two hundred Scott County jurors placed in the wheel by the jury commissioners appointed in October 1900 pending the first appeal and when another trial was possible, and the three out of 168 Bourbon County jurors summoned by the deputy sheriffs, who were Republicans. The facts thus stated as shown by said affidavits were not contradicted by any statement in any counter affidavit, save as to the political complexion of the jurors summoned from Bourbon county. The sole fact stated in any of the affidavits as to the Scott County jury commissioners and as to the Scott County jurors was that they possessed the statutory qualifications. As to the political complexion of the Bourbon County jurors one of the Bourbon deputy sheriffs stated that the claim that only two of the first venire were Republicans was untrue and that many more of them voted for McKinley in 1896 and against Goebel in 1899, another of said sheriffs stated that the claim that  
only one of the second venire was a Republican and that

723 many more of them had voted as aforesaid, and the two citizens of Bourbon stated that not less than eight of the first venire voted against Goebel and not less than five of the second venire were Republicans. Neither of these affiants specified the name of any person upon either venire who was a Republican other than the three specified in the defendant's affidavits. The showing

made by these affidavits amounted, at the most, to this—that out of 168 jurors summoned from Bourbon county as many as eight voted against Goebel and as many as five were Republicans. In each of the affidavits of the Bourbon County sheriffs and citizens it was stated that the Bourbon County jurors were sober, discreet, intelligent, good citizens of Bourbon county, thus coming up to the statutory requirement, and in the affidavits of the Scott County deputy sheriffs, who did the actual summoning of the Bourbon County jurors, they state that they told the deputy sheriffs of Bourbon county that they desired men who had the qualifications of jurors. In view of the precedent action of the judge of Scott circuit court in refusing at the first trial, to draw from the wheel the names of jurors placed there in the fall of 1899 when no motive for making the discrimination complained of existed and in appointing three Goebel Democrats as jury commissioners in October, 1900, pending the first appeal when there was the possibility of another trial, and of the showing made in the affidavit filed before him on said challenges, the reasonable inference is that the challenges were overruled not because it was held that there had not been the discrimination complained of, but because it was held that such a discrimination was not illegal and the defendant had no right to complain of it, inasmuch as it was not questioned that the jurors selected possessed the statutory qualifications.

724 As to the third trial, the transcript shows that the defendant challenged each venire summoned from Bourbon and the panel after it was completed, because of the discrimination complained of, and that said challenges were overruled. It further shows that the defendant filed in support of said challenges the affidavit of himself and of two citizens of Bourbon county, and that the Commonwealth filed the affidavits of the officers who summoned and assisted in summoning the two venires, against the challenges. The political complexion of the two venires was shown by defendant's affidavits to be as alleged in the second paragraph of the petition. In addition it was specifically shown how the discrimination complained of was actually practiced as to the first venire as follows, to-wit; that in Paris and on the Millersburg pike the officers summoned six Goebel Democrats and passed by four Republicans and one Independent Democrat—that on the Maysville, Lexington and Clintonville pikes they summoned eleven Goebel Democrats and passed by seven Republicans and one Independent Democrat—that on the Jackstown pike they summoned five Goebel Democrats and passed by three Republicans—that on the North Middletown and Flat Rock pikes they summoned four Goebel Democrats and passed by three Republicans—that in the town of Ruddles Mills and on the Millersburg and Ruddles Mill- pike they summoned eight Goebel Democrats and passed by two Republicans and one Independent Democrat—and in the vicinity of Clay's cross roads and the territory included by the Clay and Kiser pikes and the Georgetown and Cythiana pikes they summoned three Goebel Democrats and passed

by four Republicans and eleven Independent Democrats. The affidavits specified the name of each Goebel Democrat so taken and each Republican and Independent Democrat so left in these various portions of Bourbon county and that each Republican and Independent Democrat so left was a qualified juror. The affidavits of the officers filed by the Commonwealth denied that they had been guilty of the discrimination charged and stated that the persons summoned were sober, discreet and intelligent housekeepers of Bourbon county qualified for jury service—that many of the persons passed by were not qualified for jury service, some of them being United States revenue officials, others old and infirm and others practicing physicians—that of the 95 constituting the first venire more than two were Republicans and a number were Prohibitionists, Republicans and Independent Democrats—and that at least 90 per cent. of the persons qualified for jury service were Democrats and many of the Republicans who would otherwise be competent as jurors were in the service of the United States Government as storekeepers, *guagers*, rural carriers, post office and other employment—and that a number of the persons named as Republicans and Independent Democrats were lifelong Democrats. No specification was made, however, as to who of the persons so named were such Republicans or Democrats. On overruling the challenge to the first venire the court gave its reason for so doing and entered it of record. On overruling the challenge to the second venire and the panel no reason was given so far as the record shows. The reasonable presumption is that it was for the same reason that the first challenge was overruled. That reason was that it was not claimed in the grounds of the challenge that the jurors were not sensible, discreet and sober men and housekeepers of Bourbon county, over twenty one years of age, and it was expressly stated and entered of record that the challenge was overruled without any reference to the affidavits. The transcript further shows that before the venires were summoned the defendant moved the court to instruct the sheriff to summon persons without regard to political affiliation, which motion was overruled. There can be no question then but that the Scott circuit court held on this third and last trial that defendant had no right to have jurors summoned without discrimination against the political class to which he belonged. As said by Judge Barker in the dissenting opinion heretofore referred to;

“It is clear that the trial judge was of opinion that it was not an offense against the fourteenth amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service. There was no decision upon the evidence offered as to whether in fact there had been the discrimination complained of, it being necessarily assumed that this was, if true, an immaterial circumstance.”

That a refusal to hear evidence offered by the defendant in a criminal prosecution that he has been illegally discriminated against in the selection of jurors is a violation of the 14<sup>th</sup> amendment and a denial of the equal protection of the laws guaranteed by it has been settled by the Supreme Court of the United States in the recent cases of

Carter v. Texas 177 U. S. 442.

Rogers v. Alabama, 192 U. S. 226.

The Carter case was an indictment against a negro found in the State court. The defendant moved to quash the indictment because of discrimination against his racial class in selection of the grand jury. After reading his motion he asked leave of the court to introduce witnesses and offered them to prove and sustain the allegations therein made. The court refused to hear any evidence in support of said motion and overruled it without investigating into the truth or falsity of the allegations of said motion. The Supreme Court reversed the judgment against him on this ground. Mr. Justice Gray said:

"Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in a criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the fourteenth amendment of the Constitution of the United States."

And again;

"The necessary implication is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States."

The Rogers case was also an indictment against a negro found in the State court. The defendant moved to quash the indictment because of discrimination against his racial class in the selection of the grand jury. The State court struck the motion from the files because of its prolixity. The supreme court held the action of the State court in this particular was a denial to defendant of the equal protection of the laws and reversed the judgment against him.

It, therefore, appears from the second paragraph of the petition for removal in connection with the transcript that in the selection of the jurors on the second and third trials the defendant has been discriminated against by those who have had to do therewith and that on each trial it was held by the Scott circuit court that the defendant had no right to complain thereof in as much as the jurors

selected possessed the statutory qualifications. He has, therefore, been denied the equal protection of the laws guaranteed him by the 14<sup>th</sup> amendment both by said subordiante officers and said court. There is no claim put forward in the petition that the court of appeals decided against defendant's said constitutional right on either appeal or that he has been denied the equal protec-

tion of the laws by said court. By section 281 of the Criminal Code of Kentucky, it is provided as follows;

"The decisions of the court ('trial court') upon challenges to the panel and for cause, upon motions to set aside an indictment and upon motions for a new trial shall not be subject to exception."

Because of this Code provision, the court of appeals refused on the second and third hearings therein to pass upon the action of the Scott circuit court on the second and third trials therein in relation to the defendant's challenges to the venires and panels. It held that jurisdiction had not been conferred upon it to hear and pass upon such questions and hence declined to express any opinion in regard thereto. On the second hearing in the court of appeals, Judge O'Rear, who delivered the opinion on behalf of the majority, said;

"Objections were made by affidavit and motion to the manner of selecting the jury in this case, and to the venire because of its bias. The charges made are of a most serious import, if true. But it is proper to state that they are controverted, except as to the fact of the political affiliation of the panel summoned in the case. It should not be said, and it cannot be true, that *per se* a Democrat is disqualified from fairly trying a Republican charged with crime, or *vice versa*. If men should be selected as jurymen whose prejudices would be

relied on to procure a conviction or acquittal of one whom  
729 they are trying, charged with crime, we are fully persuaded that the fact of the politic of such jurymen would not be the cause of such selection. It would be the character of those so selected. But it has been held (*Terrell v. Com.*, 13 Bush, 246; *Kennedy v. Com.*, 14 Bush, 342; *Foreman v. Com.*, 86 Ky., 606 9 R., 759, 6 S. W. 579) that objection to the panel of the jury shall not be subject to review by this court. It is the opinion of the court (a point upon which, however, we have not been in entire accord) that under paragraph 281, Cr. Code Prac., this court has no jurisdiction to pass upon these questions. In the opinion of some of the members, when jurisdiction is conferred upon this court of this class of cases it is not competent for the legislature to limit the court as to what errors it may reverse for, or as to what shall not be subject of reversal; that to so allow is to leave the propriety and legality of the proceedings in the court to legislative and not judicial control. The majority of the court adheres to the former rulings on this subject. The manner of selecting the jury, except as regulated by statute, is within control of the trial court. To its sense of fairness and desire to dispense that justice in trials whose essence is impartiality, this question must be left."

On the third hearing, though the court of appeals reversed the judgment of the lower court, it refused to do so on the ground that it had erred in its action as to the challenges. Judge Barker delivered the opinion of the majority of the court setting forth the grounds upon which the reversal was had, as heretofore set forth. He also filed a separate opinion, from which I have quoted quite liberally, in which two other of the judges concurred and in which

he took the ground that the judgment should be reversed upon the error of the lower court as to the challenges. He said :

“ Having written the opinion of the court in this case on  
730 the only theory upon which a majority of the members could agree, the deep conviction I have on the Federal question contained in the record constrains me to express in a separate opinion my personal views on that subject.”

And after doing this he said ;

“ In conclusion, I am of the opinion that the trial judge should have passed upon the question of fact presented by the appellant as to the summoning of the jurors and if there was even a well grounded suspicion that unfairness had prevailed the jury should have been discharged and others summoned under such safeguards as would preclude indulgence in partisan methods.”

He took the position that the court of appeals had jurisdiction to pass on said question by virtue of article 6 of the Federal Constitution which provides that

“ This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land ; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

It is not expressly stated in the opinion delivered on the last hearing that the court refused to pass on this Federal question because of said section 281, but there can be no doubt that such was its reason in not doing so.

So far as the action of said subordinate officers and the Scott circuit court in denying defendant the equal protection of the laws is concerned, it has not been contended otherwise on behalf of the Commonwealth on the hearing of the motion ; nor has one serious word been said to the effect that the claim of defendant in  
731 this particular is not entirely correct. The sole position taken on the part of the Commonwealth has been that such action by said subordinate officers and by said court is not a denial in the judicial tribunals of the State of the equal protection of the laws within the meaning of section 641. It is contended that defendant's sole remedy is in case such action is repeated on another trial, to take the case to the Supreme Court of the United States by writ of error and get it to correct the wrong done him.

Are this position and contention correct ? What is the proper legal construction to be placed upon such action of said subordinate officers and said court ? Because of it, can it be said that the defendant is denied the equal protection of the laws in the judicial tribunals of the State where the prosecution against him is pending within the meaning of section 641 ?

The determination of this question demands ascertainment by us of the true intent and meaning of said section in this particular. But before entering upon its construction, a word or two as to whether



the section should be liberally or strictly construed. It is well settled that the fourteenth amendment should be liberally construed. In the case of *Strauder vs. West Virginia*, *supra*, Mr. Justice Strong said :

"If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purposes of its framers."

As section 641 was enacted to enforce said amendment there would seem to be some ground for holding that it, too, should be construed liberally. Another consideration that may be thought to  
732 lead in the same direction is this. The object of the jurisdictional acts of 1887-1888, as is well known, was to restrict Federal jurisdiction in civil suits. This it did by enlarging the amount in controversy essential to jurisdiction and cutting down the time within which a petition for removal might be filed and perhaps in other ways". But by section 5 thereof sections 641, 642 and 643 were continued in force without a change in any of their provisions. On the other hand, attention may be directed to the fact that the jurisdiction conferred by section 641 is a delicate one and in its exercise calculated to disturb the harmony that should exist between the Federal and State jurisdictions. This thing of taking a State prosecution for a State offense pending in a State court out of said court bodily and transferring it to a Federal court under circumstances that cannot help but be construed as a reflection upon the State court and the State itself, is a very serious matter and in view of it I am inclined to believe that the section should be strictly construed. Judge Rives characterized the Federal jurisdiction thus acquired as "an anomalous jurisdiction" and in the case of *Fowlkes vs. Fowlkes*, Fed. Cas. 5005 he thus expressed himself as to how section 641 should be construed.

"It is observable that the late comprehensive act—of March 3", 1875, embraces cases only originally cognizable by the Federal courts. The same is the case of removal on the ground of prejudice or local influence. The exception to this applies to cases of public officers—and to persons denied or prevented from enforcing in the courts of the State their equal civil rights. This departure from the fundamental principle of limiting removals to cases cognizable  
733 in the Federal courts results from the duty of the Government to its officers and the obligations of Congress to enforce by appropriate legislation the provisions of the fourteenth amendment. These exceptional statutes, therefore, are to be strictly construed, interpreted, if practicable, in subordination to and conformity with the theory of our judicial system, State and Federal, and the provisions of the Constitution."

But however this may be, the statute is not to be frittered away by construction because of the delicacy of the jurisdiction it confers. In referring to section 643 in *Tennessee v. Davis*, *supra*, Mr. Justice Strong said :

"That the act of Congress does provide for the removal of crimi-

nal prosecution for offenses against the State laws where there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State."

All certainly that can be required is that it should be made clear and reasonably certain that the case in question comes within the meaning of the statute.

What then does the statute mean by a denial in the judicial tribunals of a State of the equal protection of the laws and do said acts of said subordinate officers and of said Scott circuit court come within that meaning? Before attempting a construction of this provision of section 641, on our own account, it should be ascertained first what, if anything, has been held in regard thereto by the courts in which question as to its meaning has arisen—for if it has been held by

734 courts whose decisions are binding on me that said acts do or do not come within such provision, I have nothing more to do than to follow them. All the cases that have arisen under the statute have been in relation to alleged discriminations against negroes because of their race and color, but the principles laid down with reference to such discriminations apply equally well to the case in hand. The first cases that arose under the statute presented the question as to whether strong prejudice in the community where the prosecution was pending against the defendant on account of his race, color and politics was sufficient to make out a case under the statute, and the question was acted upon by the State courts in determining the effect of the removal proceedings on their jurisdictions. It was held by the supreme courts of North Carolina and Texas that such prejudice was sufficient to justify a removal.

North Carolina v. Dunlap.

Gaines v. State, 39 Tex. 616.

In the North Carolina case the ground of removal alleged in the petition was that there was prejudice against the defendant on account of his color and politics—that he was an active member of the Republican party, and deceased of the Democratic party—that there was a systematic effort by Democrats to produce the impression that he killed deceased from political motives—that county commissioners and sheriff and deputies were all Democrats and colored men were seldom summoned and juries were almost entirely Democrats—that there was less chance of enforcing his rights than those of a white man and probabilities of denial of them much more enhanced—that the feelings intensified by successful attempt made to give political color to the homicide and feeling against him was so bitter he could not obtain justice—and

735 that full and equal benefits of laws of the State and proceedings for the security of person and property as were enjoyed by the citizens thereof was denied to him and could not

be enforced on his behalf. The case alleged in the petition for removal in the Texas case was substantially the same as that in the North Carolina case. But the Federal courts at once took a narrower view of the statute. Justice Bradley remanded the Texas case to the State court when it came before him. *Texas v. Gaines*, Fed. Cas. No. 13,847, and he took a like position in *Ex parte Wells*, Fed. Cas. No. 17,386.

So did Judge Rives in Virginia in the case of *Fowlkes v. Fowlkes*, *supra*.

It is evident that a case of local prejudice could not be within the statute. Its constitutionality depended upon said clause of the 14<sup>th</sup> amendment. That clause prohibited State action. It had nothing to do with individual action—much less with an individual or community state of mind. The statute probably could not have made such state of mind a ground of removal. It certainly did not intend to make it so.

The question was then considered and discussed whether action by a State through any of its agencies, legislative, executive or judicial, within the prohibition of said clause of the 14<sup>th</sup> amendment could amount to such a denial and therefore justify a removal. It prohibited State action through either agency. Could a removal be had for State action within the prohibition by either agency? Judge Rives of Virginia stated in the cases of *Fowlkes v. Fowlkes*, *supra*, *Ex parte Reynolds*, *supra*, that it could, or in other words, that section 641 was as broad as said clause of the 14<sup>th</sup> amendment. In the *Fowlkes* case he said:

"When we construe this language in subordination to the constitutional amendment, it seems to me it clearly points to the action of the State in one of its three capacities, legislative, executive or judicial. Ought not the petition in such a case to designate some law, some judicial ruling, some executive act as the denial of his equal and civil rights or as constituting the obstacle to his obtaining them."

And again;

"This enactment of Congress was designed to secure him the equal protection of the laws and his equal civil rights when invaded by the State in any part of its administration, legislative, executive or judicial."

In the *Reynolds* case he said:

"A State is a sort of trinity; it exists, acts and speaks in three capacities, legislative, executive and judicial. What is forbidden to it in one capacity is forbidden to it in each and all. It may not infringe this article by legislation, but it may equally do so by its courts or its executive authorities. Hence it seems to me it is in strict pursuance of this article to base the intervention of the Federal courts on the inability to enforce in the judicial tribunals of the State or in some part thereof the equal civil rights secured by this article. The mischief is the same whether the deprivation proceeds from the law, the courts, or the executive. It is equally attributable

to the State. The laws of the State may be all conformable to the requirements of the article, but its infraction may rest with the courts or executive authorities of the counties. The amendment to be potential and attain its end should be enforced, as these enact-  
 737 ments purport, by providing a remedy for the dereliction in whatever quarter it may appear. Hence to find a *casus* for the application of this law of Federal intervention under the theory of this article, we are not restricted to the action of the legislature alone; it clearly contemplates the failure of executive or judicial remedies for the enforcement of these equal civil rights."

Judge Rives, however, seems to have overlooked the words of the statute and not to observe that the denial which it provided should be a cause for a removal was a denial "in the judicial tribunals of the State." When the Reynolds case came before the Supreme Court as it did under the style of *Virginia v. Rives*, it was laid down that by reason of this limitation the statute was not as broad as the Constitution. Justice Strong said:

"The constitutional amendment is broader than the provisions of that section." And he pointed out in his opinion an instance in which it was broader. The grounds for removal stated in the petition in the case were three. One was that a strong prejudice existed in the community against the defendants independent of the merits of the case and based solely upon the fact that they were negroes and the man they were accused of having murdered was a white man. Another one was that negroes had never been allowed to serve as jurors either in civil or criminal cases in the county, in any case, civil or criminal, in which negroes were interested. The third one was that the court before the trial had overruled defendants' motion that a portion of the jury by which they were to be tried should be composed in part of competent negroes. Judge Rives held that the  
 738 petition stated a case within section 641 and under a writ of *habeas corpus* took custody of the negroes. Of course no case was stated in the allegations as to the prejudice, as Judge Rives had held in the Fowlkes case. Nor was any case stated in the allegation that negroes had not been allowed to serve as jurors, for that may have been true and yet the exclusion may not have been the result of discrimination on account of race. He, therefore, based his action on neither one of these grounds but solely upon the refusal of the State court to provide a mixed jury. Thereupon the State of Virginia applied to the Supreme Court of the United States for a mandamus to compel restoration of the persons to State custody, which made the case of *Virginia v. Rives*. The court granted the writ, holding that the defendants were not entitled to a removal on either ground stated in the petition. I have heretofore quoted what Justice Strong had to say on the ground as to the mixed jury. This was really all that was up for decision in that case. But the fact that this was the first time that section 641 was before the Supreme Court and the broad position taken by Judge Rives led to a consideration of the statute somewhat at large. In the course of the

argument it was stated that the officer having to do with selecting the jurors from which were drawn the juries that indicted and tried defendants had illegally discriminated against them because of their race and color. This statement led the court to consider and determine whether such discrimination by such an officer was within the statute and it was held that it was not. Justice Strong said ;

" If as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute  
739 of the State, confined his selection to white persons, and refused to select any persons of the colored race solely because of their color, his action was in gross violation of the spirit of the State's laws, as well as of the act of Congress of March 1", 1875, 18 Stat. at L. 335, which prohibits and punishes such discrimination. He made himself liable to punishment, at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State and was prohibited by the constitutional amendment. But, inasmuch as it was a criminal misuse of the State law, it cannot be said to have been such a denial or disability to enforce *in the judicial tribunals of the State* the rights of the colored men as is contemplated by the removal act, section 641. It is to be observed that act gives the right of removal only to a person who is denied or cannot enforce *in the judicial tribunals of the State* his equal civil rights, and this is to appear before trial."

And again he said :

" But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied or cannot enforce *in the judicial tribunals of the State* the right which belongs to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge this duty in the true spirit of the law, if he  
740 excludes all colored men solely because they are colored, or if the sheriff to whom a venire is given composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored ; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendants' right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641."

Such denial was not, therefore, a denial in the judicial tribunals

of the State. It was simply an occasion for such tribunals to correct the wrong done.

What was thus said in *Virginia v. Rives* was subsequently decided by the Supreme Court in the cases of

*Neal v. Delaware, supra.*

*Gibson v. Mississippi, supra.*

*Smith v. Mississippi, supra.*

*Murray v. Louisiana, supra.*

In the petition in the *Neal* case the ground for removal stated was that by virtue of the constitution and laws of the State of Delaware negroes were excluded from jury service and that negroes otherwise qualified had always been excluded from jury service and had been excluded from the grand jurors who returned the indictment against defendant and from the petit jurors summoned to try the case. The State court denied the removal and thereafter defendant moved to quash the indictment and the panels of the grand and petit juries on the same ground that removal was sought, which motion was overruled. Upon conviction had, the case went to the Supreme Court on error. It was held that the petition did not state

good cause for removal, because the constitution and laws of Delaware did not exclude negroes from jury service and their actual exclusion by subordinate officers was not a denial within section 641. Mr. Justice Harlan said ;

"That Congress had not authorized a removal where jury commissioners or other subordinate officers had without authority deviated from the constitution and laws of the State, excluded colored citizens from juries because of their race."

It was held that the motion to quash the indictment and panels should have been sustained because the affidavit of the petitioner, in connection with the fact that no negro had ever been selected as a juror, grand or petit, and that the negro population exceeded 26000 in a total population of 150,000, made out a *prima facie* case of exclusion because of race and there were no counter affidavits. It is to be noted that so far as the action of the State court in overruling the motion to quash was concerned, it was not alleged as a ground for removal, it was made after the petition was denied and was overruled not because it was held that a discrimination on account of race was not illegal, but because there was no evidence of such discrimination. Chief Justice Waite, who had concurred with the majority in the decision of March 1<sup>st</sup>, 1880, dissented from the holding that the judgment of the State court should be reversed because of its action on the motion to quash, on the ground that sufficient proof of the fact of discrimination because of color had not been introduced.

In the *Gibson* case one of the grounds upon which removal was sought was that the officers who had to do with selecting the grand jurors who returned the indictment against the defendant had great prejudice against him because of his race and had illegally discrim-



inated against his race in selecting said grand jurors. It was  
742 held that defendant was not entitled to a removal on said  
ground. The Smith and Murray cases were like the Gibson  
case.

In the Smith case, however, a motion to quash the indictment on the ground of illegal discrimination had been made and overruled prior to the filing of the petition for removal, but no evidence was introduced in support of this motion. In the Murray case which was like the Smith case in the fact of prior challenge of the grand jury, the evidence showed that there had been no illegal discrimination. In neither case was the action of the court in overruling the motions to quash or challenge to the jury made a ground for removal.

It is, therefore, well settled that a class discrimination in the selection of jurors, grand or petit, by subordinate officers charged with their selection, nothing else appearing, is not a denial in the judicial tribunals of the State of the equal protection of the laws within the meaning of section 641.

On the other hand, it is equally well settled that where there is a statute providing for such discrimination, though unconstitutional and null and void, there is such a denial. This was held in the case of *Strauder v. West Virginia*, *supra*. That was a prosecution against a negro in the State courts of West Virginia, whose statute provided that jurors should consist of white male persons who were twenty one years of age and who were citizens of the State. The ground upon which it was so held is stated by Justice Strong in *Virginia v. Rives* in these words:

"When a statute of a State denies his right or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair  
that they will be controlled by it in their decisions; and in  
743 such a case a defendant may affirm on oath what is necessary for removal. Such a case is clearly within the provisions of section 641."

A contrary presumption is indulged in in a proceeding under sections 751-755 to obtain release from State custody on the ground that detention is had in violation of the constitution or a law of the United States. Justice Harlan in *Ex parte Royall*, 117 U. S. 241 said:

"The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States."

In *Neal v. Delaware*, *supra*, it was held that, though the statutes of Delaware passed prior to the 15<sup>th</sup> amendment prescribed the same qualifications for jurors as for suffrage and for suffrage that the person should be white, yet if since the adoption of said amendment

the State had treated the statute as to suffrage repealed by the 15<sup>th</sup> amendment and the jury statute affected to like extent thereby, the statute did not amount to a denial within section 641.

And in *Bush v. Kentucky* it was held that in as much as the court of appeals had held that a statute passed after the 14<sup>th</sup> amendment making an illegal discrimination as to jurors was unconstitutional because in violation of the 14<sup>th</sup> amendment, it no longer  
744 amounted to a denial within such meaning.

And in the *Gibson, Smith, Murry and Williams* cases it held certain statutes and laws as not amounting to such denial.

Such then is the full extent to which the applicability of section 641 has been determined by the courts. It is held that an illegal discrimination by subordinate officers is not within the statute, and that such a discrimination by the legislature is. It follows, therefore, that in so far as the illegal discrimination complained of by defendant was on the part of the subordinate officers who had to do with selecting the jurors from whom came the juries that tried him, the second paragraph of the petition does not state a case for removal. It follows further that in so far as said discrimination was on the part of the Scott circuit court, said paragraph states a case that is beyond any case that has yet arisen under section 641, and hence a case that is as yet undetermined by the courts. The only case in which judicial action prior to the filing of the petition for removal was made a ground of the right to removal was in the case of *Virginia v. Rives*, and it was held therein that said judicial action so relied on was not a good ground for removal, not because it was judicial action and not legislative action, but because the judicial action complained of was not a denial of the equal protection of the laws. It was simply a refusal to provide a mixed jury, to which defendants were not entitled under the 14<sup>th</sup> amendment.

It is claimed, however, on behalf of the Commonwealth that it has been laid down by the Supreme Court in the various cases coming before it involving the application of section 641 in certain general remarks on that section that judicial action can never  
745 make a case under it and that the only thing that can do so is legislative action. As for instance in *Virginia v. Rives* *supra*, Justice Strong said;

"The statute authorizes removal of the case only before trial, not after trial has commenced. It does not, therefore, embrace many cases in which a colored man's rights may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial or by discrimination against him in the sentence or the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of the State, may be and generally will be after the trial has commenced. It is then during or after the trial that denial of a defendant's right by judicial tribunals occurs. Not often until then. Nor can the defendant know until then that the equal protection of the law will not be extended to him. Certainly, until, then, he cannot affirm

that it is denied or that he cannot enforce it in the judicial tribunals. It is obvious, therefore, that to such a case that is a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced, section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the State and ultimately to the review of this court. We do not say that Congress could not have authorized the removal of such a case into the Federal courts at any stage of its proceedings, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm anything. It is sufficient to say now that section 641 does not. It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights

746 secured to a defendant by any law providing for equal civil rights of all persons of the United States of which section 641 speaks, is primarily if not exclusively a denial of such rights or an inability to enforce them, resulting from the constitution or laws of the State rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it."

Again in the case of *Neal v. Delaware*, *supra*, Justice Harlan in summing up the result of the opinions in 100 U. S. cases said:

"But it was also ruled in the cases cited that the constitutional amendment was broader than the provisions of section 641 of the Revised Statutes; that, since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial or in the sentence, or in the mode of executing the sentence; that for denials arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities secured by the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the State rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, is primarily if not exclusively, a denial of such rights or an inability to enforce them resulting from the constitution or laws of the State rather than a denial first made manifest at the trial of the case."

This language of Justice Harlan is repeated substantially  
747 in most, if not all, the subsequent cases. Does it have the value which counsel for the Commonwealth attach to it? In considering the value of such general remarks, the rule laid down by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399, should be borne in mind. It is as follows:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent

suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Take up then the first part of this statement of Justice Harlan—the negative branch of it—that which undertakes to point out what sort of a case section 641 does not embrace—what does it amount to? Does it go to the extent of saying that under no circumstances can judicial action make a case within section 641? I submit that it does not. The only judicial action to which reference is had is judicial action that comes after the filing of the petition for removal. It is "judicial action during the trial or in the sentence, or in the mode of exercising the sentence" or judicial action after the trial has commenced. The judicial action had in view here is the final judicial action in the prosecution and in the trial court. No other judicial action is thought of. This is settled by the reason given why

748 it cannot make a case within section 641, and what is said as to how it can be taken advantage of. The reason so given is that it comes after the petition for removal is filed. Of course the petition for removal cannot be based upon that which has no existence when it is filed. The way pointed out for taking advantage of it is by carrying up to the higher courts and if necessary on error to the Supreme Court of the United States. Of course the only judicial action that can be so taken advantage of is judicial action in the prosecution and judicial action that is final. It follows that judicial action outside of the prosecution or judicial action in the prosecution prior to the filing of the petition for removal is not within the negative part of Justice Harlan's statement.

Then take the latter part thereof—the affirmative part—in which he undertakes to state what section 641 refers to. He says that it refers to a denial resulting from the constitution or laws of the State rather than judicial action at the final hearing. He, however, does not say that it refers exclusively to such a denial. He is more cautious than that. He says that it refers to such a denial, "primarily if not exclusively." Again, what are the laws of a State within the meaning of those words as used by Justice Harlan in this connection? Did he have in mind solely the statutes of a State or did he include rules of action laid down by the judiciary?

Then as to the statement by Justice Strong at the close of the last quotation made from the opinion in *Virginia v. Rives*, in these words;

"In other words, the statute has reference to a legislative denial or an inability resulting from it."

Bearing in mind the rule of Chief Justice Marshall quoted above, should not that be confined to a case where there has been a denial by subordinate officers and the meaning held to be that in  
749 such a case legislative denial is essential in order to bring it within section 641?

There is no escape, therefore, from the conclusion that we have here a brand new case—a case beyond any that has been heretofore decided or if not beyond any other—has been had in contemplation. Does it then come within the true intent and meaning of section 641? Though it is beyond the cases heretofore decided, we can obtain help from them in answering this question. The result of those cases we have found to be is that an illegal discrimination of the kind complained of by the subordinate officers who select the jurors when there is nothing in the statute requiring it is not within section 641. On the other hand, such an illegal discrimination made by statute is within said section. Now it would seem that if we can get a firm grasp of the idea why the one discrimination is held not to be a denial in the judicial tribunals of the State and the other discrimination is so held to be such a denial, we will have obtained some help to the solution of said question. The reason why a discrimination by subordinate officers is held not to be a denial is, as stated by Justice Strong in a quotation already made from his opinion *Virginia v. Rives*, this;

“It ought to be presumed the court will redress the wrong.”

Or again;

“The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court.”

The reason why a discrimination by legislative action is held to be a denial is, as likewise stated, this;

“When a statute of the State denies his right or interposes a bar to his enforcing it in the judicial tribunals, the presumption 750 is fair that they will be controlled by it in their decisions.”

The one discrimination is not a denial, therefore, because it will not affect the judicial tribunals of the State prejudicially to the defendant. The other discrimination is a denial, because it will so affect said tribunals. It will not affect them absolutely or certainly. It may not affect them at all. Indeed it is their duty not to be affected by it. Article 6 of the Federal Constitution requires that they should not be affected by it. But they may be, and the presumption is to be indulged that they will be, notwithstanding that in a *habeas corpus* case under sections 751–755 on account of one claiming to be in custody in violation of the Constitution the contrary presumption is indulged in.

Does it not follow from this that any other State action involving an illegal discrimination which will in a real sense affect the judicial tribunals of the State—in as real a sense as legislative action will—is within the meaning of section 641? I think it is.

We reach the same conclusion if we consider the purpose of the section—the end it was intended to accomplish—its spirit which has been congealed in the words of the statute—and from that lofty height view and construe the language, what was that purpose or end? Was it not to secure in the State judicial tribunals a free and full exercise and enjoyment of the equal protection of the laws, as

full and free as ought to be obtained or can *ob* obtained in the Federal tribunals, and was it not intended to provide that, if a defendant in a prosecution pending there could not obtain such exercise and enjoyment of such protection in those tribunals—if there was any real hindrance or obstacle to obtaining them there—then he

751 should have the right to have the prosecution removed to the Federal court? It seems to me that it was. These two considerations lead to the conclusion that the denial referred to and within the meaning of the statute was not a denial that had its place in the judicial tribunals of the State, but a denial that in a real sense had an effect there, without any limit as to where it took place, provided it had an effect there. If so, then prior judicial action either outside of or within the particular prosecution which would affect the State court having to do with said prosecution in affording this defendant therein the equal protection of the laws in its further handling of the prosecution was within the meaning of the statute. As for instance, suppose the court of appeals though reversing the judgments against him on the various grounds stated had held that it had jurisdiction to consider the question as to the illegal discrimination complained of and that the defendant had no right to be free from such discrimination, would that not have made a clear case of a denial to the defendant of the equal protection of the laws and authorized a removal under section 641? Such judicial action would have affected the lower court in its further handling of the case in just as real a sense as an unconstitutional statute providing for the discrimination. There would seem to be no question as to this and that such a case would be clearly within section 641.

The position that what amounts to a denial of the equal protection of the laws by judicial action prior to the filing of the petition for removal may be within section 641, is strengthened by two considerations. One is that the denial called for by said section is not limited in its words to a denial by legislative action. There is not a word said about legislative action in the section. The other is that the section authorizes a petition for removal to be filed after

752 judicial action has been had not only outside of the prosecution but within it. The time fixed for filing it is "at any time before the trial or final hearing of the cause." In the case of *Ayers v. Watson*, 113 U. S. 594, Justice Bradley said:

"This language has been held to apply to the last and final hearing."

To the same effect, see

*Home Life Ins. Co. v. Dunn*, 86 U. S. 214

*Vannever v. Bryant*, 86 U. S. 4

*Jifkins v. Sweetser*, 102 U. S. 177

*B. & O. R. R. Co. v. Eates*, 119 U. S. 464

*Fisk v. Henarie*, 142 U. S. 459,

*City of Detroit v. Detroit City Ry. Co.*, 54 Fed. 10.



In *Bush v. Kentucky*, *supra*, the case was removed from the State court on the first application after a reversal by the court of appeals of a judgment in the trial court. And in *Davis v. So. Carolina*, 107 U. S., a removal was had under section 643, which has same language as 641 as to time after a trial and verdict and a new trial granted.

The statute, therefore, contemplated a removal after several trials and the case had gone to the court of appeals several times as here and therefore after judicial action had in the prosecution that might affect the last and final trial.

Besides all this, the cases in which the supreme court has had to do with the construction of section 641, are not without intimation that judicial action prior to the filing of the petition for removal might make a case for removal. In the case of *Virginia v.*

753 *Rives*, in holding that a case for removal had not been made on the ground that before the filing of the petition the State court had refused to provide the defendant with a mixed jury—the only case that has arisen in which judicial action prior to the filing of the petition has been made a ground of removal—the supreme court did not base its ruling upon the ground that prior judicial action could not be made a cause for removal, but on the ground that the prior judicial action complained of therein was not a denial of the equal protection of the laws, inasmuch as a mixed jury was not an element of such protection; and it seems to be implied that prior judicial action that was a denial thereof might be made a cause for removal.

And in the case of *Neal v. Delaware*, Justice Harlan expressly said as follows:

"Had the State since the adoption of the fourteenth amendment, passed any statute in conflict with its provisions or with the laws enacted for their enforcement, or had its *judicial tribunals* by their decisions, repudiated that amendment as a part of the supreme law of the land or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial upon its part of equal civil rights or such an inability to enforce them in the judicial tribunals of the State as under the Constitution and within the meaning of section 641, would authorize a removal of the suit or prosecution to the circuit court of the United States."

This language is repeated in one of the subsequent cases.

Again in *Bush v. Kentucky* it was held that a statute illegally discriminating against negroes passed after the 14<sup>th</sup> amendment, which, nothing else appearing, would have amounted to a denial in the judicial tribunals of the State under *Strauder v. West Virginia*, did not amount thereto in that case, because prior to filing of the petition for removal the court of appeals had held the statute unconstitutional. If then a denial could be removed by judicial action, could it not as well be created thereby.

The Commonwealth's contention really comes down to a question

of tenses. Its position amounts to this. A defendant in a prosecution in a State court who has been denied therein the equal protection of the laws prior to the filing of a petition for removal is not entitled to a removal, because the denial is a past denial and not a present one. The position is fallacious in that it assumes that such a past denial may not be a present one. Though past in being made, if never set aside, it is present in force and effect.

Conceding then that it is possible for judicial action in a prosecution in a State court prior to the filing of the petition for removal to make a case for removal, is the prior action of the Scott circuit court at the second and third trials of defendant, in holding that he had no right to be exempt from the discrimination complained of and in thus denying him the equal protection of the laws, sufficient to entitle defendant to a removal? It all depends upon whether such action is a hindrance or obstacle in a real sense to a free and full exercise and enjoyment of such right at another trial in said court—just as much so as an unconstitutional statute which said court should disregard and refuse to follow would be. Though the judgments of conviction in said court have been reversed, they have not been reversed on the ground of such action but on other grounds. The court of appeals has held that it had no jurisdiction to consider or question said action and has declined to do so. The Scott circuit court is the highest court in the State that had or has a right to deal with that question. It has on two occasions  
 755 held that the defendant had not the right which he claims and has entered upon its records that the defendant is not entitled thereto, and that entry has never been expunged or set aside. It remains there today. It must be conceded that this action and this entry will have an influence upon the future action of the court in this particular. The granting to defendant of the right asserted by him at another trial will be a change of front on the part of the court. To grant it, it will have to reverse its former action. Besides this, there is the possible effect of the fact that it is a reasonable inference that the *the* minority of the court of appeals at the last hearing who with the former judge of the Scott circuit court now constitutes, the majority thereof believed and would have held had they had jurisdiction of the matter that defendant had no such right as he asserted. The basis of the inference is the expression of regret in the opinion of the minority that the judgment of the lower court had to be reversed. This in the face of the fact, that the record showed that the right had been denied can reasonably be accounted for only upon the idea that it was believed that defendant had no such right. This reference is enforced by the statement in the opinion of the minority at the second hearing, when amongst the errors complained of was the limit of such right, in these words; "Outside of the refusal of the circuit judge to vacate the bench all error complained of may justly be compared to fly specks on the surface of a hen's egg," and by the further statement therein with reference to the second trial at which there had been such a denial

that the "circuit judge presided with rare ability and with entire impartiality."

756 It cannot be urged that said prior action of the Scott circuit court denying the defendant the right he claims is not a real hindrance and obstacle in the way of the future assertion of that right in said court, because there is now a new judge on the bench. A change of judges in the past has not affected a change in action with reference to defendant's right. Indeed, such a change, instead of being a reason for expecting a change in such action, may be regarded as a reason for not expecting it, on the ground of comity. In courts of original jurisdiction, comity, as a rule, at least, requires that the successor of another judge in a case shall adhere to the latter's former rulings therein.

I, therefore, conclude that the prior action of the Scott circuit court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein, just as real as an unconstitutional statute would be, and that the defendant is denied the equal protection of the laws in said court within the meaning of said section and entitled to a removal on account thereof. He is denied in said court the equal protection of the laws because he has been denied and such denial has never been set aside, but remains in full force and effect.

But thus far we have only dealt with one half of the statute. It remains to consider briefly the other half thereof. It is claimed in the petition of removal that defendant cannot enforce his right to the equal protection of the laws in the judicial tribunals of the State and because of this he is entitled to a removal. By an inability to enforce in the judicial tribunals of the State is meant, as I construe the statute, any judicial tribunal of the State that may have

757 jurisdiction of the prosecution. It was intended thereby to provide that, if a defendant in a criminal prosecution pending in a State tribunal cannot enforce his right to the equal protection of the laws in such court or in any court to which it may be carried, then he is entitled to a removal. In this case the court of appeals of Kentucky has jurisdiction of the prosecution against defendant. It can be carried there on appeal from the circuit court, but defendant cannot enforce therein his right to the equal protection of the laws, if denied in the circuit court, at a future trial, and this is by virtue of legislative action embodied in section 281 of the criminal code heretofore quoted as construed by the court of appeals. (The only answer that is made to this is that if defendant is entitled to a removal because of this inability to enforce said right, every defendant in a criminal prosecution instituted in a circuit court in this State will be entitled to a removal.) This however does not follow. It only follows that every defendant who has been prejudiced by the inability to enforce, as defendant has been, is entitled to a removal. In the case of *Com. v. Wright*, 79 Ky. 22, the question was up whether a white person indicted by a grand jury composed wholly of persons of the white race, could complain because

negroes were excluded from the jury by which he was indicted under the statute of Kentucky excluding them therefrom. It was held that he could not. Chief Justice Cofer said :

"Only those who are prejudiced by an unconstitutional law can complain of it."

Likewise I would hold that only persons who may be prejudiced by the statute making it so that a defendant in a criminal prosecution cannot enforce his rights to the equal protection of the laws in the court of appeals of this State, can have a removal to the Federal court because of such inability.

The conclusion I have reached, therefore, is that this case comes within both halves of the statute. It is no answer to defendant's right to the removal sought that he could have had the denial of his right to the equal protection of the laws corrected by the Supreme Court of the United States on error thereto, had either of the last two judgments against him been affirmed by the court of appeals or that he can obtain such correction if there is a similar denial in the future and a judgment of conviction against him is allowed to stand. Notwithstanding this remedy, he is entitled to the remedy of removal, if the case comes within the statute. Congress has seen fit to provide him with this remedy, and all that is essential to entitle him to it is that his case shall come within the terms of the statute, and that I have found to be the case.

But to say the very least, it is not certain that defendant can correct the denial complained of if repeated at another trial, and, so far as my research has gone, I have been unable to find a decision of the Supreme Court of the United States which would authorize a writ of error in this sort of a case. If entitled to such writ, it must be to re-examine either the judgment of the Scott circuit court or the judgment of the court of appeals affirming that judgment. It is difficult to see how it could, in any state of the case, be to re-examine the judgment of the Scott circuit court, either before or after a judgment of affirmance by the court of appeals. Section 709 U. S. Rev. Stat., relating to writs of error as to judgments and decrees of State courts, expressly provides that the judgment or decree of a State

court which the Supreme Court may re-examine and reverse or affirm upon writ of error is the "final judgment or decree" in the highest court of a State in which a decision in the suit could be had." The Scott circuit court is not the highest court of the State in which a decision in the prosecution against the defendant can be had. The court of appeals is that court. An extreme application of this requirement is the case of *Great Western Tel. Co. v. Burnham*, 162 U. S. 342.

There the circuit court of Wisconsin had overruled a demurrer to the petition. The appellate practice of the court of that State authorized an appeal to the supreme court from such an order, and an appeal was taken therefrom. It was held that the demurrer should have been sustained, the order was reversed and the cause was remanded to the circuit court for further proceedings according to law.

The lower court thereupon sustained the demurrer and dismissed the petition. It was held that the judgment of the circuit court was not subject to a writ of error—that an appeal should have been taken to the supreme court of the State, notwithstanding it was bound by its former ruling and would affirm the case as a matter of course, and upon its doing so, the judgment of affirmance should have been made the subject of the writ.

The following cases on error from Massachusetts, to-wit; *McGuire v. Com.* 3 Wall. 269, *McDonald v. Massachusetts*, 180 U. S. 344, *Rothschild v. Knight* 184 U. S. 334 in which it is held that the judgment of the superior court of Massachusetts and not that of the supreme court is the subject of the writ of error, should be distinguished. This was because the superior court of that State is the highest court in which a final judgment or decree is such a suit can be had, 760 the supreme court simply passing on exceptions and certifying its rulings to the superior court.

Likewise this case on error from New York, to-wit, *Green v. Van Buskirk*, 3 Wall. 448, in which it was held that on affirmance by the court of appeals of that State of a judgment of the supreme court thereof and sending the record to the supreme court with directions to enter judgment, which was accordingly done, a writ of error might be taken to the latter court, should be distinguished. This was because a writ of error may be taken to either court where the judgment of the highest court may be found. On such writ of error, however, it is the judgment of the highest court of the State and not that of the lower court which is re-examined. Justice Story in *Gelston v. Hoyt* 3 Wheat. 304, said as follows;

"It must be directed either to that tribunal which can execute it; to that in which the record and judgment to be examined are deposited; or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing in this particular the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the State having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."

As distinguishing the Massachusetts and New York case see 761 *Atherton v. Fowler*, 91 U. S. 143.  
*Crane Iron Co. v. Hoagland*, 105 U. S. 701.

So it is that it has always been the practice in taking cases to the Supreme Court of the United States from Kentucky after the affirmance of a judgment of the circuit court by the court of appeals to take



the writ of error from the court of appeals. The following cases were so taken, to-wit:

- Patterson v. Kentucky, 97 U. S., 501.
- Crutcher v. Kentucky, 141 U. S., 47.
- Cov. & Cin. E. R. & T. B. Co. v. Kentucky, 154 U. S., 224.
- Henderson Bridge Co. v. Kentucky, 166 U. S., 150.
- Chesapeake & Ohio R. R. Co. v. Kentucky, 179 U. S., 388.

If then defendant would be entitled to a writ of error at all in case of a future denial, it could only be taken from the judgment of the court of appeals affirming the judgment of the Scott circuit court to re-examine said judgment of affirmance. It is difficult to see how it could lie to said judgment because it would not be against any Federal right of the defendant. The legislature has provided that the court of appeals of Kentucky shall not have jurisdiction to review challenges to the juries in criminal prosecutions for any cause whatsoever and that the action of the circuit court is final in regard thereto. At least the court of appeals has so construed sec. 281, and that construction is binding in this court. It was not bound to provide that any appeal might be taken from a judgment of the circuit court in a criminal case. It might have made the judgment of the circuit court final. An appeal, therefore, being a matter of grace and not of right it could be granted on such terms as the legislature saw fit.

- 762 Missouri v. Lewis, 101 U. S., 22.
- Andrews v. Swartz, 156 U. S., 272.
- Kohl v. Lehlback, 160 U. S., 293.
- Millett v. North Carolina, 181 U. S., 589.

In this State the legislature has seen fit to grant an appeal but has provided that on an appeal, rulings of the lower court as to challenges to the jury, as to motions to set aside the indictment and as to motions for new trial cannot be considered by the court of appeals. This it had a right to do. It seems to me, therefore, that the court of appeals was correct in its ruling heretofore declining to pass on the Federal question raised by defendant in regard to the selection of the jurors from which came the juries that tried him. It has not denied him the equal protection of the laws, because it had no jurisdiction to pass on the question. And here I feel constrained to differ from Judge Barker's position in his separate opinion on the last hearing. He based his opinion that the court of appeals had jurisdiction of the Federal question on article 6 of the Federal Constitution, which provides that the Constitution and laws of the United States shall be the supreme law of the land and that the judges in every State shall be bound thereby. But this article of the Federal Constitution does not undertake to confer jurisdiction on State judges or courts. It simply provides that State judges and courts, in disposing of matters of which they have jurisdiction, shall be bound by the Federal Constitution and laws, and nothing more.



If, then, the court of appeals has no jurisdiction of the Federal question involved here and it declines to pass upon it, how can a writ of error be taken to its judgment. It has passed on no Federal question adversely to defendant. In the case of *Great Western Tel. Co. v. Burnham*, *supra*, Justice Gray said:

"This court has no jurisdiction upon writ of error to review a judgment of a State court, unless it was a final judgment by the highest court of the State in which a decision in the suit could be had, and against a right set up under the Constitution and laws of the United States."

In *Gelston v. Hoyt*, *supra*, Justice Story said:

"The judgment to be examined must be that of the highest court of the State having cognizance of the case."

And in *Fashnacht v. Frank*, 23 Wall., 416, Chief Justice Waite said:

"We act only upon the judgment of the supreme court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error."

In the cases cited above which went to the Supreme Court of the United States on error from Kentucky in which a reversal was had, to-wit, the *Crutcher and Cov. & Cin. E. R. & T. B. Co.* cases, the judgments of the Supreme Court were that the judgments of the court of appeals of Kentucky be reversed—not a word being said about the judgments of the circuit court which had thereby been affirmed."

What makes me hesitate to take the position that no writ of error would lie to the Supreme Court in the case under consideration is that it is hard to conceive of its being possible that there should be a case where a denial by a State court of a Federal right could not be carried on error to the Supreme Court. To prevent such a *casus*

*omissus* one would be justified in straining the language of section 709 to utmost limit, and it is evident that it would not be favored by the Supreme Court.

In the case of *Lurton v. North River Bridge Co.*, 147 U. S. 336, it was held that a writ of error would not lie to the circuit court of the United States for the district of New Jersey to reverse an order appointing commissioners to assess damages in a condemnation proceeding, because such an order was not final. In the prior case of *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, it was held that a writ of error would lie to the supreme court of West Virginia, affirming the order of a lower court appointing commissioners for such purpose in such a proceeding. In distinguishing this case from the later case, Justice Gray said that the former was accounted for by the fact that the supreme court of West Virginia had held that the order of the lower court was a final order from which error lay to it and said:

"To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order

appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of validity of the condemnation except by writ of error to the order appointing commissioners."

And in the case of *Great Western Tel. Co. v. Burnham*, *supra*, in response to the position of plaintiff in error that a writ of error to the circuit court was the only way in which the Federal question involved in that case could be reviewed, Justice Gray 765 said:

"If all this were so, there would be strong ground for sustaining the present writ of error.

I am not unmindful of the fact that in *Bush v. Kentucky*, *supra*, the Supreme Court of the United States reversed the judgment of the court of appeals because it affirmed a judgment of the circuit court, which had overruled a motion to set aside an indictment found when the discriminatory statute of Kentucky had not been declared unconstitutional, when it should have sustained the motion, and that a code provision similar to section 281 was then in force. But no attention seems to have been called to the existence of this code provision or as to its having any bearing upon the question. So far as the opinion of that case shows, the court of appeals considered and passed on the question. At least there is nothing showing that it did not.

If then no writ of error would lie to the Supreme Court in case defendant should hereafter be denied the equal protection of the laws, all the more reason for holding that this case comes within section 641. In that event, the alternative remedies would be either a removal under section 641, or, if convicted, a release from State custody and from further prosecution for the offense in any court upon writ of *habeas corpus* under sections 751-755. The latter is the more delicate remedy of the two, and of the two the former is to be preferred. If, however, it cannot be said certainly that a writ of error will not lie, only that it is uncertain whether it will lie and that it will take the Supreme Court to determine the question, then it will hardly be right to let go a remedy for a wrong that is practically conceded on the idea that another remedy exists therefor,

766 until it has been settled beyond question that the other remedy exists. For if I shall decide that the remedy of removal under section 641 does not exist, and hence overrule the motion, it would be a letting go of that remedy. This action would have to be followed by an order remanding the cause to the State court, and no appeal or writ of error could be taken therefrom, nor could I be compelled to take jurisdiction by mandamus. It was so decided by the seventh circuit court of appeals in *Cole v. Garland*, 107 Fed., 759. On the other hand, if I decide to take jurisdiction, my action is not final. Application can be made to the Supreme Court for a mandamus commanding me to restore de-

defendant to State custody, as was done in *Virginia v. Rives*, and the whole question as to defendant's remedies can be settled for all time to come. That the fact that the grave questions which I have considered herein cannot be carried further if I decide against defendant and that they can be carried further if I decide in his favor, should have something to do with controlling my action; and just what it should have to do therewith is well stated by Judge Sanborn in the recent case of *Boatmen's Bank v. Fritzlen*, 135 Fed., 655. He there said:

"Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat. When a case has been removed from a State to a Federal court, and a motion to remand is made, or when a motion to remove is presented in the first instance to the Federal court, the petitioner either has or he has not the right to the trial and decision of his controversy in that court. That right is of  
767 sufficient value and gravity to be guaranteed by the Constitution and acts of Congress. If it exists, and the circuit court denies its existence, and remands and refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. And the true rule is that motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, of law, and the reasons which conditioned them, in view of the fact that the right to invoke the jurisdiction of the Federal court is a valuable constitutional right, and an erroneous affirmance of the claim of that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless."

It remains to say a word or two in conclusion in regard to the first paragraph of the petition, in which it is claimed that defendant is entitled to a removal because the State courts have denied the validity of the pardon issued by Taylor. In order for that to be a good ground for removal it is necessary, in addition to such denial, that defendant had a right to be released from custody because of such pardon, and further that the right to such release was secured to him by the fourteenth amendment. As to the right to be released from custody because of said pardon I do not think that I have the right to pass upon the question on its merits. The question as to who was governor of Kentucky *de jure* and *de facto* on the 10<sup>th</sup> of

March, 1900, and as to the validity of said pardon is a local  
768 one and it has been determined by the court of appeals of Kentucky that Beckham was governor of Kentucky both *de*

*jure* and *de facto* on said date and that said pardon is invalid, and I think I am concluded by that determination. Furthermore, even if said right existed, I do not think that it is one secured to the defendant by the equal protection of the laws clause of the fourteenth amendment. If it is, then every right one has is so secured and every decision by the State courts against such a right would present a Federal question and a ground for removal. This certainly cannot be the case.

My conclusion, therefore, is that by virtue of the second paragraph of the petition, the removal proceedings have worked a transfer of jurisdiction. It seems to me that it would be hard to get a case that more certainly comes within section 641. The defendant has been denied the equal protection of the laws in the Scott circuit court and he cannot enforce his right thereto in the court of appeals.

Since writing the foregoing I have stationed myself away from it and looked at it to see what possible flaw I could detect in its reasoning. So far as my mental vision goes I am unable to detect any, but another position than those urged by counsel for the Commonwealth occurs to me for claiming that this case does not come within section 641 and I think I ought to refer to it. The positions which said counsel have urged are two, one relating to each half of the statute. That relating to the first half is that a judicial denial is not, and only a legislative denial, is, within said section, and that relating to the second half is that if defendant can claim a removal of section 281 of the Kentucky Criminal Code then every person against whom a criminal prosecution is instituted in this State can likewise claim a removal. These are the only positions which they

769 have put forward or relied on. The additional position that has so occurred to me is that I am wrong in assuming that the equal protection of the laws clause of the 14<sup>th</sup> amendment is a law providing for the equal civil rights of citizens of the United States in the meaning of section 641—that the law had in view thereby is a statute so providing—that the only statute which it could have had in view is section 1977 U. S. Rev. Stat., which provides that;

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."

—and that this section is limited in the benefits which it confers to negroes and other colored persons and that white persons have acquired no rights thereunder. The effect of this position is to limit the right of removal provided by section 641 to negroes and other colored persons and exclude white persons therefrom. In support of the proposition that said section had in view a statute only, and that

statute section 1977, reference may be made to Justice Strong's statement in *Stauder v. West Virginia* that section 641 "plainly has reference" to said section 1977.

But to say that it has reference thereto is not the same as to say that it is limited thereto. And the equal protection of the laws clause is a law providing for the equal civil rights of all persons within the jurisdiction of the United States in that by reason of it all such persons have such rights. It is a part of the organic law of the Federal Government to that effect. The position, if not vulnerable here, is so at another point. Section 1977 so far as it confers rights is not limited to negroes and colored persons. It confers rights on white persons. The persons on whom it confers rights are "all persons within the jurisdiction of the United States." It is only when it comes to define the rights which the section confers that they are referred to as such "as is enjoyed by white citizens."

Concerning this section Justice Strong said ;

"This act puts in the form of a statute what has been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provision."

And he refers to section 641 in relation to said section as "an advance step." According to this, section 1977 is as broad as the 14<sup>th</sup> amendment as to the persons affected by it ; and it is well settled now, however it may have been earlier, that said amendment relates to all persons without reference to color. If indeed section 641 was intended to be limited to negroes or other persons of color, it is difficult to understand why it did not so provide instead of conferring the right of removal upon "any person who is denied or cannot enforce" &c.

The motion for the writ is sustained.

A. M. J. COCHRAN, Judge.

July 7<sup>th</sup>, 1905.

771 On the same day, to-wit:—July 7<sup>th</sup>, 1905, the writ of *habeas corpus cum causa* directed to be issued in the foregoing order was issued herein, said writ being in words and figures as follows, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY	} Order.
vs.	
CALEB POWERS.	

This cause came on to be heard on the motion of the defendant, Caleb Powers, for a writ of *habeas corpus cum causa* and was argued by counsel for Powers and by counsel for the Commonwealth and was submitted to the court, on consideration whereof, said motion is

granted for the reasons set forth in the written opinion which is filed herein and made a part of the record; and it is ordered that the clerk issue a writ of *habeas corpus cum causa* commanding the jailor of Scott county to deliver said Caleb Powers into the custody of the marshal of this court and said marshal is directed to keep said Powers confined in the county jail of Campbell county at Newport, until further order of this court.

UNITED STATES OF AMERICA,  
Eastern District of Kentucky, } ss :

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and eastern district of Kentucky, at London, do hereby certify that the foregoing is a true and correct copy of an order entered and filed herein, in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at London, this 8<sup>th</sup> day of July, A. D., 1905, and of our Independence, the 130<sup>th</sup> year.

[SEAL.]

JOS. C. FINNELL, Clerk.

772 UNITED STATES OF AMERICA,  
Eastern District of Kentucky. }

To the jailor of Scott county, Kentucky.

We command you that the body of Caleb Powers, in your custody detained, be delivered to S. G. Sharp, U. S. marshal, for the eastern district of Kentucky, as provided by an order this day made and entered by the United States circuit court for said district, to be dealt with in said court as provided in said order and according to law.

Witness the Hon. A. M. J. Cochran, judge of the U. S. circuit court, this 7<sup>th</sup> day of July, A. D., 1905.

[SEAL.]

JOS. C. FINNELL, Clerk.

Upon said writ appears the return of the United States marshal, which return was and is in words and figures as follows, to-wit:—

"Received the within order at Covington, Kentucky, July 8<sup>th</sup>, 1905. Executed same by delivering a copy of said order to George S. Robinson, clerk of the Scott circuit court at Georgetown, Kentucky, also one copy of same to Joe Finley, jailer of Scott county, at Georgetown, Kentucky, and further by delivering to Bernard Ploeger, jailer, in Newport, Kentucky, the body of the within named, Caleb Powers, this 10<sup>th</sup> day of July, 1905.

S. G. SHARP,  
U. S. Marshal."

On the same day, to-wit:—July 7<sup>th</sup>, 1905, a petition for appeal and assignment of error, was filed herein, same being in

773 words and figures following, to-wit:—



Circuit Court of the United States Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY	}	Petition for Appeal and Assign- ment of Error.
vs.		
CALEB POWERS.		

The Commonwealth of Kentucky prays an appeal, to the Supreme Court of the United States from the order of the court granting a writ of *habeas corpus* to take the custody of Caleb Powers from the circuit court of Scott county, Kentucky, solely upon the question of the jurisdiction of this court as a court of the United States to make said order and to issue said writ, and she assigns as error that this court was without jurisdiction because the petition for removal does not state a case authorizing the removal of the prosecution from the State court into the Federal court and that this court was without authority under the Constitution and laws of the United States to assume jurisdiction of said prosecution or to take the custody of said Powers from the State court, and she prays that said question of the jurisdiction of this court as a court of the United States to make said order granting said writ of *habeas corpus* may be certified to the Supreme Court of the United States.

N. B. HAYS,  
Attorney General.

Clerk will file this petition.

A. M. J. COCHRAN, Judge.

July 7", 1905.

On the same day, to-wit:—July 7", 1905, an order was  
774 made and entered herein, said order being in words and  
figures as follows, to-wit:—

Circuit Court of the United States, Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY	}	Order Allowing Appeal and Cer- tifying Question of Jurisdiction.
vs.		
CALEB POWERS.		

Upon consideration of the petition of the Commonwealth of Kentucky for an appeal to the Supreme Court of the United States from the order of this court granting a writ of *habeas corpus* to take the custody of Caleb Powers from the State court, it is hereby certified that the question of the jurisdiction of this court as a court of the United States to make said order was raised by the Commonwealth of Kentucky at the hearing of the petition of said Powers for said order and was in issue, the Commonwealth claiming that the petition for removal does not state a case authorizing the removal of the prosecution from the State court into the Federal court, and that this court was without authority under the Constitution and laws

of the United States to assume jurisdiction of said prosecution or to take the custody of said Powers from the Scott circuit court; and the said objection of the Commonwealth of Kentucky to the jurisdiction of this court as a court of the United States to make said order or issue said writ was overruled and the writ ordered to be issued; and the court hereby in open court allows an appeal to the Supreme Court of the United States solely upon said question of the jurisdiction of this court as a court of the United States to make said order granting said writ of *habeas corpus* and said question of the jurisdiction of this court is hereby certified to the Supreme Court of the United States.

775 The appeal bond is fixed at \$500.00.

A. M. J. COCHRAN, Judge.

July 7<sup>th</sup>, 1905.

On a day following, to-wit:—July 25, 1905, the bond on appeal was filed herein, said bond being in words and figures following, to-wit:—

Know all men by these presents: That we, the Commonwealth of Kentucky, as principal and Chas. J. Bronston and Arthur Goebel as sureties are held and firmly bound unto Caleb Powers, in the full and just sum of five hundred dollars, to be paid to the said Caleb Powers, his certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25<sup>th</sup> day of July, A. D., 1905.

Whereas, lately at a circuit court for the eastern district of Kentucky on the seventh day of July, 1905, in a suit pending in said court, between the Commonwealth of Kentucky, plaintiff and Caleb Powers, defendant, a decree was entered against the said Commonwealth of Kentucky, and the said Commonwealth having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit and a citation directed to the said Caleb Powers, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the — day of — next.

776 Now the condition of the above obligation is such, that if the said Commonwealth of Kentucky shall prosecute its appeal to effect and answer all costs, if it fail to make its plea good then the above obligation to be void; else to remain in full force and virtue.

C. J. BRONSTON. [SEAL.]  
ARTHUR GOEBEL. [SEAL.]

Sealed and delivered in the presence of  
JOS. C. FINNELL, Clerk.

Approved by

A. M. J. COCHRAN, Judge.

## 777 THE UNITED STATES OF AMERICA, ss :

The President of the United States to Caleb Powers, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the circuit court for the eastern district of Kentucky, and filed in the clerk's office of said court on the 7<sup>th</sup> day of July, A. D., 1905; in a cause wherein The Commonwealth of Kentucky is the appellant, and you are the appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable A. M. J. Cochran, United States district judge for the eastern district of Kentucky, this 31<sup>st</sup> day of July A. D., 1905.

A. M. J. COCHRAN,  
U. S. District Judge, Eastern District of Ky.

Service of a copy of the within citation is hereby admitted this 3<sup>rd</sup> day of August, A. D., 1905.

R. D. HILL,  
Attorney for Appellee.

778 UNITED STATES OF AMERICA, }  
Eastern District of Kentucky, } ss :

I, Jos. C. Finnell, clerk of the circuit court of the United States for the sixth judicial circuit and eastern district of Kentucky, do hereby certify and return to the claim of appeal of the Commonwealth of Kentucky in a cause pending in said court, wherein The Commonwealth of Kentucky is plaintiff and Caleb Powers is defendant, that the above and foregoing is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at London, in said district, this 3 day of August, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States, the one hundred and thirtieth year.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,  
Clerk of the Circuit Court of the United States for the  
Eastern District of Kentucky, at London.

779

Supreme Court of the United States.

THE COMMONWEALTH OF KENTUCKY, Appellant, }  
 vs. } No. —.  
 CALEB POWERS, Appellee.

Notice for the Purpose of Abridging the Printed Record under  
 Rule 10, Clause 9.

The appellant considers the following portions of the transcript from the Scott circuit court unnecessary for the consideration of the appeal on the errors which she has assigned, and she therefore proposes to omit the same in printing the record, to-wit :

Deposition of W. S. Taylor, pages 59 to 105, inclusive ;

Deposition of W. J. Davidson, pages 106 to 125 inclusive ;

Deposition of Charles Finley, pages 126 to 161, line 18 inclusive ;

The minutes of the examining court, pages 163 to 259 inclusive ;

Summons for witness, page 260 ;

Response of H. H. Kelley to *subpœna duces tecum*, pages 261 to 263, inclusive ;

Affidavit of Caleb Powers for continuance, pages 270 to 279, inclusive ;

780 Statement of counsel for defendant for continuance, page 280.

List of witnesses summoned, page 289 ;

Order for *subpœna duces tecum* for Garrett Hignite, page 291 ;

Order for *subpœna duces tecum* for James Eggleston, page 291 ;

Order for *subpœna duces tecum* for R. R. Perry, page 292 ;

Order for *subpœna duces tecum* for J. W. Siler, page 293 ;

The court's instructions to the jury, pages 295 to 300 inclusive ;

The instructions asked by the defendant, pages 304 to 307, inclusive ;

The instructions offered by the Commonwealth, pages 309 to 313 inclusive ;

The instructions offered by the Commonwealth and refused, pages 342, line 5, to page 346, line 25, inclusive ;

Instructions asked by the defendant and refused, page 347, line 3 to page 350, line 9 inclusive ;

Instructions given by the court, page 351 to 356, line 28, inclusive ;

Defendant's affidavit for continuance, pages 395 to 427, line 20, inclusive ;

Statement of counsel for defendant, for continuance, page 427, line 21, to page 428, inclusive ;

Defendant's affidavit for continuance, pages 504 to 517, inclusive ;

Affidavit of defendant for continuance, pages 520 to 540, line 22, inclusive ;

Statement of counsel for defendant for continuance, page 540 line 23, to 541, inclusive,

781 Amended affidavit of defendant for continuance, pages 542 to 543 inclusive;

Plea of pardon, pages 584 to 595, inclusive, being a repetition of the plea found at pages 492 to 503, inclusive;

Instructions of the court to the jury, pages 599 to 605 inclusive;

Instructions requested by the defendant and instructions given by the court, pages 635, line 14 to 646, line 17, inclusive.

N. B. HAYS,  
Attorney General.

I hereby certify that I served the foregoing notice on Caleb Powers on August 29, 1905, by handing him a copy thereof.

S. G. SHARP,  
U. S. Marshal, Eastern Dist. of Ky.,  
By SAM S. SHEPARD, Deputy.

782 [Endorsed:] File No. 19,895. Supreme Court U. S. October term, 1905. Term No. 393. The Commonwealth of Kentucky, app't, vs. Caleb Powers. Designation by counsel for appellant of parts of record to be omitted in printing and proof of service of same. Filed August 31st, 1905.

783 Supreme Court of the United States, October Term, 1905.

THE COMMONWEALTH OF KENTUCKY, Appellant, }  
vs. } No. 393.  
CALEB POWERS, Appellee.

The appellee thinks the following portions of the record mentioned in the notice of the appellant material, and request that the same be printed, to-wit:

Deposition of W. S. Taylor, pages 59 to 105 inclusive.

Deposition of W. J. Davidson, pages 106 to 125 inclusive.

Deposition of Charles Finley pages 126 to 161, line 18, inclusive.

Plea of pardon, pages 584 to 595 inclusive, being a repetition of the plea found at pages 492 to 503 inclusive.

CALEB POWERS.

784 [Endorsed:] Designation by appellee under sec. 9, rule 10.  
[Endorsed:] File No. 19,895. Supreme Court U. S. October term, 1905. Term No. 393. The Commonwealth of Kentucky pl'ff in error, vs. Caleb Powers. Designation by counsel for appellee of parts of record to be printed. Filed Oct. 10", 1905

Endorsed on cover: File No. 19,895. E. Kentucky C. C. U. S. Term No. 393. The Commonwealth of Kentucky, appellant, vs. Caleb Powers. Filed August 30, 1905. File No. 19,885.